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In The

Supreme Court of the United States

October Term, 1996

UNITED STATES OF AMERICA ex. rel. Don H. Haycock,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

Should this court reverse the trial and appellate court rulings that approves an unlawful labor-charging practice of Hughes Aircraft Company, to which there is no legal support, and which violates federal regulations to which both petitioner's (relator's) expert and Hughes Aircraft Company experts agree are exclusive and mandatory.

Also, is the due process clause of the Fifth Amendment violated when the district court awards attorney fees and costs based on their approval of this unlawful labor-charging practice without a requested hearing and without any evidence or legal authority to support this ruling.

LIST OF PARTIES

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JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on October 6, 1996 and Petitioner's timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was rejected on December 6, 1996 (*see* App. 1 and 2). Jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS FEDERAL STATUTES AND FEDERAL REGULATIONS INVOLVED

Constitutional Provisions

U.S. Constitution, Amendment V

No person shall be . . . deprived of . . . property without due process of law . . .

Statutes

31 USC 3729 False Claims

(a) *Liability for certain acts.* Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government;

* * *

is liable to the United States Government for a civil penalty of not less that $5,000 and not more that $10,000

plus 3 times the amount of damages which the Government sustains because of the act of that person . . .

31 USC 3730 Civil Actions for False Claim

(b) *Actions by private persons.* A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government . . .

* * *

(c)(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.

* * *

(d)(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

10 USC 2306 Truth in Negotiations

(f)(1) A prime contractor or any subcontractor shall be required to submit cost or pricing data under the circumstances listed below, and shall be required to certify that, to the best of such contractor's or subcontractors knowledge and belief, the cost or pricing data submitted was accurate, complete and current:

(A) before the award of any prime contract under this chapter [10 USC 2301] entered into after using procedures other than sealed bid procedures . . .

(B) before the pricing of any contract change or modification . . .

(C) . . .

(D) . . .

Regulations

48 Code of Federal Regulations Chapter I Part 52.230-4
(CAS Clause 52-230-4)

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this contract, the contractor shall take the steps outlined in (a) through (f) below:

(a) Submit to the cognizant Contracting Officer a description of any accounting change, the potential impact of the change on contracts containing a CAS clause, and if not obviously immaterial, a general dollar magnitude cost impact analysis of the change which displaces the potential shift of costs between CAS-covered contracts by contract type . . .

(b) submit a cost impact proposal in the form and manner specified by the cognizant Contracting Officer within 60 days after the date of determination of the adequacy and compliance of a change submitted pursuant to (a) above. If the above proposal is not submitted within the specified time . . . an amount not to exceed 10 percent of each payment made after that date may be withheld until such time as a proposal has been provided in the form and manner specified by the cognizant Contracting Officer.

(c) agree to appropriate contract and subcontract amendments . . .

(d) . . .

(e) Notify the Contracting Officer in writing of any adjustments required to subcontracts . . .

4 Code of Federal Regulations, Chapter III, Sub-Chapter G

COST ACCOUNTING STANDARDS – CONSISTENCY IN ESTIMATING, ACCUMULATING AND REPORTING COSTS

Part 401.20 Purpose. The purpose of this Cost Accounting Standard is to insure that each contractor's practices used in estimating costs for a proposal are consistent with costs accounting practices used by him in accumulating and reporting costs. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike. With respect to individual contracts, the consistent application of cost accounting practices will facilitate the preparation of reliable cost estimates used in pricing a proposal and their comparison with the costs of performance of the resulting contract. Such comparisons provide one important basis for financial control over costs during contract performance and aid in establishing accountability for costs in the manner agreed to by both parties at the time of contracting. The comparisons also provide an improved basis for evaluating estimating capabilities.

Part 401.40 Fundamental Requirements.

(a) A contractor's practices used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting cost.

(b) A contractors cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating costs in pricing the related proposal.

(c) . . .

Part 401.50 Techniques for Application. . . . costs estimated for proposal purposes shall be presented in such a manner and in such detail that any significant cost can be compared with the actual cost accumulated and reported therefor. In any event the cost accounting practices used in estimating costs in pricing a proposal and in accumulating and reporting costs on the resulting contract shall be consistent with respect to: (1) *The classification of elements or functions of cost as direct or indirect;* and, (3) the methods of allocating indirect costs to the contract. (italics added)

4 Code of Federal Regulations, Chapter III, Sub-Chapter C

Part 331.50 Contract Clause. . . . the clause set forth below shall be inserted in all negotiated national defense prime contracts and subcontracts.

* * *

(2) Follow consistently his cost accounting practices in accumulating and reporting contract performance cost data concerning this contract. If any change in cost accounting practices is made for purposes of any contract or subcontract subject to Cost Accounting Standards Board requirements, the change must be applied prospectively to this contract, and the Disclosure Statement must be amended accordingly. If the contract price or cost

allowance of this contract is affected by such changes, adjustments shall be made . . .

* * *

(4)(B) Negotiate with the contracting officer to determine the terms and conditions under which a change may be made to a cost accounting practice . . .

Part 351.120 Amendment of Disclosure Statement.

(a) Disclosure Statements must be amended when disclosed practices are changed to comply with new Cost Accounting Standards . . .

48 Code of Federal Regulations, Chapter I

Part 31.202 Direct Costs. (a) A direct cost is any cost that can be identified specifically with a particular final cost objective . . .

Part 31.203 Indirect Costs. (a) An indirect cost is any cost not directly identified with a single, final cost object, but identified with two or more final cost objectives or an intermediate cost objective. *It is not subject to treatment as a direct cost.* (italics added)

STATEMENT OF CASE

A. INTRODUCTION

This is a qui tam action brought against Hughes Aircraft Company for fraudulent labor charging practices in violation of the False Claim Act 31 USC 3129; and the Truth in Negotiations Act 10 USC 2306. This action charges Hughes with violating these federal statutes by knowingly charging the labor of overhead employees directly to contracts with the United States government

without complying with the mandated federal regulations identified herein.

The Hughes' Systems Engineering Laboratory, or SEL, is charged with this fraudulent labor charging from 1984 through 1987 wherein petitioner was employed as an Engineering Projects Manager and observed these fraudulent practices. During this period SEL had approximately 650 employees that provided technical support to other Hughes organization directly responsible for performing contracts for the United States government. The labor of substantially all of these employees, including employees with overhead job classifications, was charged directly to these contracts as direct costs.

This fraudulent labor-charging was accomplished in two ways.

One way, by overhead employees being indiscriminately directed by management to charge their labor directly to government contracts in violation of Hughes expressed labor charging practice. The Hughes "Attendance and Labor Reporting" manual imposes strict procedures to ensure that only authorized employees charge their labor directly to government contracts. This includes prior written authorization directing these employees to charge their labor to specific accounts on these contracts; and, theirs and their supervisors certification that their labor was charged to those specific accounts in accordance with this authorization.

The second way, by overhead labor being charged to a direct-labor-allocation-system ("allocation system") that distributed the labor of these overhead employees directly to those government contracts comprising this allocation system.

Charging an employee's labor to the allocation system required that employee's job classification be re-classified from overhead labor to direct labor in accordance with these federal regulations. This re-classification is mandatory whether the labor-charging is by Hughes' expressed labor charging practice, or by the allocation system, as both Hughes and Petitioner's expert agree.

This strict control of overhead labor vis-a-vis labor directly charged to government contracts, or direct labor, is important because during this period – as Hughes has acknowledged – the government paid Hughes for employees charging their labor directly to government contracts an additional 165.518 to 174.950 percent over the actual cost of their labor. Of these percentages, 155.49 to 173.83 percent was to pay for the cost of overhead labor. This is the table Hughes provided:

	YEAR		
"MULTIPLIER" DESCRIPTION	1984	1985	1986
Labor Overhead			
Engineering	155.49%	143.09%	173.83%
Cost of Money			
CITE	.00316	.0026	.00166
Engineering	.31952	.24277	.21732
G&A Expenses	9.63	9.73	9.03
Profit**	N/A	N/A	N/A

**Profit is not a "multiplier" or burden that is added to direct labor costs.

Knowingly charging unauthorized overhead labor to the United States government as labor directly on government contracts has been held a fraud under the False Claim Act. *United States v. Uber* (6th Dist. 1962) 303 F.2d 462; *United States v. Dinerstein* (2nd Dist. 1960) 362 F.2d 852.

The trial court granted Hughes summary judgment, and awarded attorney fees and costs, based solely on a misinterpretation of the declarations of Hughes' experts. This misinterpretation resulted in both rejecting Hughes' failure to comply with these federal regulations; and, mistakenly concluding that the use of the government's approval of the allocation system and Item 2.50 in the disclosure statement justified Hughes' unlawful labor-charging practice. (*See* App. 5-13) The Hughes experts are Dudley P. Slater and Allan E. Brunmier. During this period Mr. Slater was the Resident Auditor at Hughes with the Defense Contract Audit Agency, he is now retired; Mr. Brunmier was a member of the Air Force Plant Representative Office and the Principal Contracting Officer, he is now a Hughes employee. Petitioner's expert, Peter Elliott, is an expert in this field as disclosed in his declaration.

The declarations of both Hughes' experts and petitioner's expert, Peter Elliott, concur that charging overhead labor directly to government contracts *must be in compliance with these mandated federal regulations.*

Both Slater's and Brunmier's declarations acknowledge the government's approval of the allocation system; and, describe and illustrate the procedure for re-classifying overhead employees to direct labor so their labor can be charged to the allocation system. Specifically, they

reveal "managers and secretaries" were re-classified in compliance with these federal regulations. Although generically correct. Brunmier's declaration identifies only five job-codes of technical managers and secretaries after December 1985 as confirmed by Elliott's declaration. Neither Brunmier's or Slater's declaration give blanket approval – or even allude – to Hughes' unlawful labor charging practice – contrary to what the Ninth Circuit courts concluded (Brunmier's declaration is at App. 37; Slater's at App. 64; and, Elliott's at App. 16)

Nonetheless, the trial court ruled that Item 2.50 of the Disclosure Statement entitled Hughes to charge the labor of any overhead employee directly to government contracts if Hughes independently and unilaterally concluded the labor of these individual employees "benefited" all the contracts to which their labor was charged. Item 2.50 is referred to in the trial court's ruling on App. 7 as page 71 of Brunmier's declaration, and is now App. 43 of Brunmier's declaration. It is as follows:

Item 2.50

> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts; but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

The trial court granted Hughes summary judgment and awarded attorney fees and costs under 31 USC 3730 based entirely on Slater's and Brunmier's declarations. However, this court only considered in its ruling the government's approval of the allocation system and Item

2.50 and did not address Hughes' fraudulent labor-charging in violation of its "Attendance and Labor Reporting" practice, which admittedly would have been irrelevant had this ruling been correct.

The appellate court summarily approved the trial court's ruling without any acknowledgment to the evidence, law or issues expressed in appellant's briefs, including mandatory compliance with these federal regulations and Hughes' failure to comply. From oral argument before the appellate panel it became evident that this court's ruling was based only on supposition and speculation that Brunmier and Slater knew and approved the Hughes unlawful practice. There is no evidence to support this conclusion.

B. ALL EXPERTS AGREE COMPLIANCE WITH THESE FEDERAL REGULATIONS IS THE ONLY LAWFUL WAY OVERHEAD LABOR CAN BE CHARGED DIRECTLY TO GOVERNMENT CONTRACTS

The declaration of experts Peter Elliott, Allan Brunmier and Dudley Slater all confirm that compliance with these Federal Regulations on both *mandatory* and *exclusively* the only lawful way overhead labor can be charged directly to government contracts. Specifically:

1. Prior notice to the government that the labor-hours of overhead employees, within specific job classifications will be charged directly to government contracts (60) days before a specific date, as mandated by 48 CFR, Ch. I, Part 52.230-4 (CAS Clause 52-230-4)

Elliott's declaration: App. 24

Slater's declaration: (paragraph no. 4) "After initial submission of a Disclosure Statement, each time the contractor changes an accounting practice, it is required to submit to the DCAA and AFPRO an amended Disclosure Statement at least 60 days before the effective date of the proposed change." (App. 66)

Brunmier's declaration: Exhibit F is prior notice to him from Slater to reclassify five job classifications of technical managers from overhead to direct so their labor could be charged directly to government contracts (App. 49). Exhibit H (App. 55) is Brunmier's response approving this reclassification form overhead to direct of these five classification of technical managers.

2. Filing with the government, each time the labor-hours of overhead employees are to be changed directly to government contracts, a CAS Disclosure Statement Amendment designating both the accounting change of the reclassification and its effective date, as mandated by Title 4 CFR, Ch. III, sub-chapter C, Part 331.50 (CAS Clause 331.50)

Elliott's declaration: App. 27

Brunmier's declaration: Revised Disclosure Statements to accounting changes of Hughes' Cost Accounting Standards show compliance with this Federal Regulations, as represented by Exhibits B2, B3, C, G and H of Brunmier's declaration (App. 44, 45, 46, 53 and 55 respectively)

Slater's declaration: (paragraph no. 4) "Once the amended CAS Disclosure Statement

is timely submitted to the government the proposed changed may be effected even before the contractor receives official approval for the change." (App. 66)

3. Filing with the government a cost impact study of the cost impact on each government contract affected by the accounting change, as mandated by 48 CFR, Ch. I Part 52.230-4 (CAS Clause 52-230-4)

Elliott's declaration: App. 23, 24, 25, 28, 29 and 30

Brunmier's declaration: (paragraph 12) "In connection with this review [of Disclosure Statement], my office analyzed the expected cost impact of the proposed changes to determine whether the changes would increase the cost to the government of Hughes' contract performance." (App. 40)

Slater's declaration: (paragraph no. 10) "Also in connection with my review of the EDSG's allocation system, my office analyzed the [cost] impact of having various levels of lab managers, assistant lab managers and their secretaries across EDSG charge their time into a pool [allocation system] . . . " (App. 69)

4. Reclassifying Hughes employees by job codes from overhead to direct – and not as *individual* employees as was the unlawful Hughes practice. This is mandated by Item 3.1.0 of Hughes Disclosure Statements and the declaration of Hughes Controller Paul Hendricks

Elliott's declaration: App. 33

Paul Hendricks' declaration: (paragraph no. 5) " . . . Item 3.1.0 of the EDSG's Disclosure Statement . . . maintained: Cost classification

guides lists [of] individual job classifications and titles, and indicated whether the job is classified as direct or indirect." (not in appendix)

Brunmier's declaration: Exhibit F is for five job codes of technical managers that Slater requested be reclassified direct labor (App. 49) Exhibit D, para. 4 (App. 47) is the Disclosure Statement amendment for re-classifying secretaries so their labor can lawfully be changed to the allocation system.

Slater's declaration: (paragraphs 6, 7, 8 and 10, App. 59 and 60) "The allocation system at issue during these discussions involved the charging of time of lab managers and their secretaries into the direct pool [allocation system]. In connection with my own analysis of the EDSG lab managers and secretaries who were planned to be placed on the allocation system, . . . "

C. THE HUGHES' UNLAWFUL LABOR-CHARGING PRACTICE

This practice is described in the declaration of Hughes Controller, Robert Meyers. (App. 57) Particularly significant is his declaration that *no notice* was given the government by Hughes unilaterally re-allocating the labor of *individual* overhead employees directly to government contracts. Specifically:

Paragraph No. 10 (App. 60). "No employee within any EDSG division could charge his or her time to the allocation system unless he or she had been formally authorized by the division controller to do so, . . . "

> Paragraph No. 11 (App. 61). "Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system . . . This determination was made based upon a review of each employee's job classification, function and assignments."
>
> Paragraph No. 14 (App. 62). "The program managers generally disclosed the name runs on a periodic basis to the customers, including the government. This provided the customers with knowledge as to which employees were charging to the contract both directly, as well as through the allocation system."

As Peter Elliott's critique of Mr. Meyers declaration reveals, this practice violates every mandated federal regulations for reallocating overhead labor directly to government contracts. Specifically:

1. 48 CFR, Ch. 1 Part 52-230-4 (FAR Clause 52-230-4) is violated because there is no notice to the government of Hughes request to charge the labor of specific job codes of overhead employees directly to government contracts.

2. 4 CFR, Ch. III, Subchapter C, Part 331.50 and Part 351.120 (FAR CAS Clauses 331.50 and 351.120) are violated because there is no CAS Disclosure Statement Amendment designating the accounting change to reallocate the labor of these overhead employees directly to government contracts, and the date this reallocation is to become effective.

3. FAR CAS Clauses 52-230-4 is further violated because no cost impact study was performed of the cost

impact to affected government contract comprising the allocation system.

4. 4 CFR, Ch. III, Subchapter G, Parts 401.20, 401.40 and 401.50 (FAR Clauses 401.20, 401.40 and 401.50) are violated because Hughes' practices of estimating costs for a proposals *are not* consistent with the cost accounting practices used in accumulating and reporting of costs.

5. Hughes violated Item 3.1.0 of its CAS Disclosure Statement with the government by reallocating the overhead labor of *individual employees* and not by the *job classifications* of overhead employees as mandated by Hughes' Disclosure Statement.

D. HUGHES ACKNOWLEDGED NON-COMPLIANCE WITH THESE FEDERAL REGULATIONS.

Because the labor of five job codes of technical managers and secretaries after December 1985 were re-allocated directly to government contracts in compliance with these federal regulations, Hughes has claimed this generically in all its pleadings and briefs as "managers and secretaries." Hughes makes no claim, nor do its experts Brunmier and Slater, that the labor of other overhead employees in other job classifications was reallocated directly to government contracts in compliance with these Federal Regulations.

However, the labor of substantially all other overhead employees were charged directly to government contracts. To explain, Hughes contends that compliance with these Federal Regulations was not necessary because Item 2.50 the Cost Accounting Disclosure Statements approved by the government were sufficiently broad,

standing alone, that they could independently – and even without any notice to the government – reallocate overhead labor directly to government contracts. Hughes relies totally on one clause of its disclosure statement, Item 2.50 (App. 43, Exhibit C of Brunmier Declaration)

It is Hughes contention that Item 2.50:

> " . . . put the government on notice that . . . SEL . . . would allocate" those labor charges of any employee Hughes decided *benefited* those government contracts that comprised the allocation system." (Hughes' Statement of Uncontroverted Facts)

Also, Hughes re-affirmed this contention in oral argument before the appellate panel on September 14, 1995:

> "JUDGE NELSON: Mr. Haycock had two nails up there, one of them labelled secretaries and the other labelled managers. He would have driven them into the lectern making the point that the only thing that was covered was managers and secretaries. What's the short answer to those nails?
>
> "MR. GALLAGHER (Hughes Attorney): The short answer is that the language of 2.5.0 says direct pools will be utilized by persons whose labor changes are impractical to individually charge to specific contracts but which clearly benefit same. It doesn't say anything about managers or secretaries. In fact, the declarations of Mr. Slater and Mr. Brunmier both say that the language covers all of the supervisory, managerial, secretarial and other support personnel. People other than engineers who were out actually designing . . . " (Page 19 of the transcript of

the oral argument before the panel on September 14, 1995.)

THIS STATEMENT IS NOT TRUE. Brunmier's and Slater's declarations only approve, " . . . *the use of direct allocation pools* for charging the time of [Hughes' employees]" as the trial court correctly stated in its summary judgment order and order awarding attorney fees. These declarations *do not* approve the Hughes' unlawful labor-charging practice. Mistakenly the trial court did approve Hughes' unlawful practice by incorrectly concluding Item 2.50 alone gave Hughes this right.

Since this overhead labor was charged directly to those government contracts, it was subject to the 165.518 to 174.950 percent burden on direct labor.

E. TRIAL COURT FAILED TO CONSIDER AND RULE ON THE UNLAWFULNESS OF HUGHES' LABOR-CHARGING PRACTICE

Both the trial court's summary judgment order and its order for attorney fees and costs was based entirely on the declarations of Brunmier and Slater (App. 37 and 64 respectively). This reliance is expressed in these orders (App. 5 and 8). This court mistakenly only addressed the issue of whether the government approved the allocation system; and, finding it did concluded that Item 2.50 entitled Hughes to engage in its unlawful labor-charging practice. By this erroneous conclusion, this court mistakenly attributed to Brunmier and Slater approval of this practice. This conclusion *was not* in their declarations.

The introductory paragraphs of these orders acknowledge these declarations as the single authority for these orders, and then concluded each order as follows:

Summary Judgement Order

" . . . the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pool for charging the time of *managers, supervisors, secretaries, and other support personnel.* Slater Decl. paras 6,7,8,10. &11; Brunmier Decl. para 13(c), (d); Defendant's reply of Jan. 19,1994 at pp. 24-29. . . . And, the most important document language – that which is set forth in Hughes' Disclosure Statements – is clearly not limited in the way Plaintiff suggests, e.g. Brunmier decl. at p. 71. [Item 2.50] The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' Direct allocation pool cost charging system."

Order Awarding Attorney Fees

"As this court found, both of such declarants testified under oath that, during the 1983 through 1987 timeframe at issue in the complaint, there was full disclosure, discussion, consideration, and approval of the use of the direct allocation pools for charging the time of *managers, supervisors, secretaries, and other support personnel.*"

> "As this Court found in granting Hughes' motion for summary judgment, the declarations of the then-cognizant government officials showed conclusively that Haycock's allegations had no merit and "the record is thus uncontroverted that the government had no complaints, was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system"

In both orders the court correctly interprets Brunmier's and Slater's declarations as providing only the:

> " . . . approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,* and *other support personnel.*"

This court then went on to mistakenly conclude that Item 2.50 was the single vehicle for implementing the " . . . use of direct allocations pools . . . " Since this was the Hughes unlawful practice, both orders approved the Hughes' unlawful labor-charging practice.

Neither Brunmier nor Slater state, or even intimate, that Item 2.50 is this vehicle. Both declarations mandate that compliance with these Federal Regulations is the *only* vehicle for charging the labor of overhead employees directly to Government contracts. Further, there is no indication in either of these declarations that Brunmier and Slater even were aware of the Hughes unlawful practice and it provided no notice to them.

In denying petitioner's motion for re-consideration, the trial court acknowledged, and rejected, the claim that the unlawful practice violated mandated Federal Regulations. This is evident from the following statement in its order denying reconsideration:

> "The motion for reconsideration is predicated on the declaration from Relator's expert vis-a-vis the substantive issues of whether Hughes violated the False Claims Act. The declaration is presented for the first time. Its substance consists mostly of the evidence already presented to this court, and interpretation thereof concluding that Hughes violated the False Claim Act." Rejection of this claim was also acknowledged in the trial court's summary judgment order.

Contrary to what the trial court concluded and ruled, there is no dispute between petitioner's expert Peter Elliott and Hughes' experts Dudley P. Slater and Allan E. Brunmier that compliance with these federal regulations is both *mandatory* and *exclusive*.

F. THE APPELLATE COURT RULINGS WERE BASED ON SPECULATIONS AND SUPPOSITIONS THAT BRUNMIER AND SLATER KNEW AND APPROVED THE HUGHES' UNLAWFUL LABOR-CHARGING PRACTICE

The appellate court summarily adopted the trial courts orders without any discussion or reference to the evidence, to the law or to the issues presented in petitioner's briefs (App. 2).

However, oral argument before the appellate panel reveals their mistaken conclusion that Brunmier and Slater both knew and approved Hughes unlawful practice.

> JUDGE NELSON: (To Mr. Gallagher, Hughes attorney) "I take it that the accounting

standard contemplated some downstream exercise of discretion as to whether John Manager fit within this change or not."

MR. GALLAGHER: That's correct.

This position is further indicated by JUDGE KLEINFELD'S questions indicating his mis-interpretation of the declarations of: Brunmier, Slater and Elliott:

JUDGE KLEINFELD: There's part of your brief I didn't really understand. I was looking for exactly what the lie was that Hughes Aircraft allegedly told to the Government, under the truth and negotiations act and the false claims act, and I couldn't figure it out. As far as I can tell, you thought that some employees should have been on direct billing instead of – or should have been on overhead instead of having their time billed directly. But the Government said, no, Hughes told us what they were doing and we approved it. I don't understand what the false claim is.

MR. HAYCOCK: I don't understand. I don't believe the Government said that. I don't think the government took any position in this at all. To my knowledge, they didn't. I will get to that issue as I go through what I have to offer this morning for there is a misrepresentation as to the federal regulations under which these charges have been made.

JUDGE KLEINFELD: Well, I understood it went a little beyond that. That this fellow Allan Brunmier was hired by the Government to look over the accounting and he thought it was okay the way Hughes did it.

MR. HAYCOCK: No. Mr. Brunmier is an employee of Hughes Aircraft Company. At the time of this period, that this complaint arose, he was the principal contracting officer representing the Government.

JUDGE KLEINFELD: And he says he determined that the accounting system was in accord with Government accounting practices and would not have an adverse cost impact on the Government.

MR. HAYCOCK: That's not what he said. What he said was that Hughes had complied with these provisions, these FAR [CAS] provisions, which I've covered quite thoroughly in my briefs and I won't go into. But basically it has to do with when an accounting change is made there has to be notification of the change. Supposed to be 60 days in advance, supposed to be a cost impact statement, and there's supposed to be an amended disclosure statement. That's what's required and that is not in dispute. My witnesses and Hughes' expert witnesses agree on that. That is required.

Now Mr. Brunmier, what he said in his declaration is that Hughes complied with these FAR regulations as to managers and secretaries. If you read his declarations, the reference is made to managers and secretaries.

Going further, if you go in to these declarations that are filed by the experts of Hughes Aircraft Company, Mr. Brunmier, Mr. Slater and Mr. Hendricks [Hughes' Controller] in their declarations they talk specifically about managers and secretaries. And there is no dispute that, in a broad sense, managers and secretaries can charge to these accounts because they were

approved according to these FAR [CAS] Regulations. Hughes' made a specific request for five classifications of technical managers, and you have to make these [requests] by job classification . . . The Government approved it.

Hughes filed a cost impact statement. That's in Mr. Brunmier's declaration. Hughes filed an amended disclosure statement. They were approved according to these FAR regulations.

The same with secretaries. Hughes acknowledges that after December 1986, Hughes did the same thing. This is all in the briefs. They notified the Government, they filed a cost impact study, and they filed an amended return [disclosure statement].

So we don't dispute that these people could properly charge directly to government contracts. . . . in Hughes' motion to [for] summary judgment, in their statements of undisputed facts and conclusions of law, and it their . . . summary judgment order, all specified managers and secretaries. These other people weren't mentioned.

JUDGE KLEINFELD: Is there some evidence in the record to counter the Brunmier declaration?

MR. HAYCOCK: Well, there's the declaration of my expert. The Brunmier declaration is not really contested. It's saying that declaration supports this position. If you take managers and secretaries in a broad sense, that's accurate. That's accurate because he states what the law is.

Mr. Slater, the former DCAA auditor, he states exactly what it is. His declaration and my

expert's declaration are mirror images. Mr. Hendrick's declarations is not contested . . .

Brunmier's and Slater's Declarations *do not* approve the Hughes' unlawful labor-charging practice. Also, Brunmier, Slater and Elliott all concur that compliance with mandated Federal Regulations is required to re-allocate overhead labor directly to Government contracts. The Hughes practice does not do this and there is no authority to support it.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED TO CORRECT THE LOWER COURTS ABUSE OF DISCRETION IN GRANTING HUGHES SUMMARY JUDGMENT AND ATTORNEY FEES AND COSTS

The trial court abused its discretion in granting Hughes motion for summary judgment and attorney fees and costs; the appellate court abused its discretion by summarily affirming the trial court's ruling without reference or consideration of the evidence and mandatory Federal Regulations for re-allocation overhead labor directly to Government contracts. (*see* App. 2 to 13)

Granting Hughes summary judgment and awarding attorneys' fees and costs should be reviewed by the abuse of discretion standards as to whether the lower courts committed and error of *law* and/or of *fact*. *Barber v. Hawaii* (9th Cir. 1994) 42 F.3d 1185; 1189; *United States v. McConney* (9th Cir. 1984) 782 F.2d 1195, 1201; Appellate Court's ruling (*see* App. 3).

A court abuses its discretion by making an erroneous interpretation of the law. *Hunt v. National Broadcasting Co., Inc.* (9th Cir. 1989) 872 F.2d 289, 292. "The district court may abuse its discretion several ways. First, the court abused its discretion if it did not apply the correct legal standard . . . " *Hunt*, supra, p. 292.

Abuse of discretion occurs when the lower courts rest its decisions on a clearly erroneous finding of fact. *Zepeda v. United States I.N.S.* (9th Cir. 1983) 753 F.2d 719, 725.

The lower courts made the following erroneous rulings of *law* and *facts*:

1. The trial judge *incorrectly* concluded that the Hughes labor-charging practice was proper, and Hughes need not comply with the mandated Federal Regulations in re-allocating overhead labor directly to Government contracts – contrary to the declarations of their own experts. Specifically, that the declarations of Slater and Brunmier *alone* authorized Hughes to unilaterally, and without compliance with mandated Federal Regulations charge the time of "*managers, supervisors, secretaries,* and other *support personnel.*" (*see* App. 7)

2. By the trial judge *incorrectly* concluding that Hughes was not required to provide the Government with: prior notice of accounting changes; cost impact analyses; and, CAS Disclosure Statement Amendments, as required by mandated Federal Regulations.

3. By the trial judge *incorrectly* concluding that Hughes was making "full disclosure" of its labor-charging practices to Brunmier and Slater, the then Government officials. Their declarations do not provide any

expressed or implied indication that they were even aware of the unlawful Hughes labor-charging practice and this practice *does not* include notification of it to them. (*See* Robert Meyers declaration, App. 62 para. 14)

Lower courts' summary judgment rulings may be set aside if its order is *opaque and unilluminating* as to either the relevant facts or law with respect to the merits of appellant's claim. *Carter v. Stanton* (1972) 405 U.S. 669, 671. It is the district court's duty to specify what facts are established, and if it fails to do so, all of the issues as framed by the pleadings are open for trial. *Hartman v. American News Co.* (7th Cir. 1948) 171 F.2d 581, 584, certiorari denied (1949) 337 U.S. 707 [69 S.Ct. 1989]. Summary Judgement should be denied unless the moving party can establish the facts on which he is entitled to summary judgment *under applicable principles of substantive law. Bloomgarden v. Cover* (CA DC 1973) 479 F.2d 201, 206; *Koepke v. Fontecchio* (9th Cir. 1949) 177 F.2d 125, 127. The moving party has the burden of affirmatively demonstrating that the responding cannot prevail *as a matter of law.* This is true because the burden to show there is not a genuine issue of material fact rests on the party moving for summary judgment. *Doff v. Brunswick Corp.* (9th Cir. 1966) 372 F.2d 801, 813, Certiorari denied 1967) 389 U.S. 820 [88 S.Ct. 39].

The trial court violated congressional enactments of Federal Law by disregarding mandated Federal Regulations in its rulings of summary judgment and awarding attorney fees and costs. The appellate court further rejecting these enactments by summarily affirming the trial court's rulings without any reference or consideration of these mandated Federal Regulations. By granting this

writ these enactments will be properly interpreted and enforced to carry-out the intent of congress; and, inform Government contractors that arbitrarily charging overhead labor directly to government contracts violates Federal Laws that will be enforced by the courts.

B. CERTIORARI SHOULD BE GRANTED SO DAMAGES MAY BE PROVED UNDER THE RELEVANT STATUTES

The trial court's summary judgment rulings denied the Government the right to prove damages under: 31 USC 3729 False Claims: 31 USC 3730 Civil Actions for False Claims; and, 10 USC 2306 Truth in Negotiations. As presented herein, the trial court's summary judgment order was an abuse of discretion both as to the *facts* and applicable *law*. The Government has the right to have this judgment reversed and prove damages resulting from this unlawful labor-charging practice.

C. CERTIORARI SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S MIS-INTERPRETATION AND MIS-APPLICATION OF FEDERAL REGULATIONS

The Ninth Circuit courts' approval of the unlawful labor-charging practice is totally without any legal basis. This ruling is an invitation to present and potential Government contractors to engage in this unlawful labor-charging practice because the Ninth Circuit has approved it. If not now, the time will clearly come when these rulings must be reversed to comply with mandated Federal Regulations – as both Petitioner's and Hughes'

experts concur. Petitioner urges that the time for this action is now rather than later when the U.S. Government has suffered further, and considerable, monetary damages from this unlawful labor-charging practice.

D. THE CERTIORARI SHOULD BE GRANTED BECAUSE THE AWARD OF ATTORNEY FEES AND COSTS VIOLATED THE DUE PROCESS PROVISION OF THE FIFTH AMENDMENT

The Due Process provision of the Fifth Amendment limits the actions of the Federal Government that would deprive persons of "life, liberty or property" *Robinson v. Fauver* (D.N.J. 1996) 932 F.Supp. 639. Due Process under the Fifth Amendment are flexible and depend upon circumstances of a given case but require, at minimum, some kind of notice and hearing before final deprivation of property interest. *Tri-County Industries, Inc. v. District of Columbia* (DC 1996) 932 F.Supp. 4.

On April 22, 1994 Petitioner filed with the District Court "Request for Oral Argument on Defendant's Motion to Tax Attorney Fees." (Petitioner's Excerpts of Record No.126, page 396) This motion was denied.

A person has been denied Due Process when there is no evidence to support taking his liberty, *Thompson v. City of Louisville* (1960) 362 U.S. 199; 80 S.Ct. 624; 4 L.Ed. 2d 654.

Petitioner submits that he was denied Due Process by the Trial Court denial of his request for a hearing. Also, he was denied Due Process by the Trial Court awarding attorney fees and costs on a mistaken understanding of

what the evidence proved. Specifically, that this court's approval of Hughes' unlawful labor-charging was error because there is no basis in the evidence on which court relied to support such a conclusion. The Fifth Amendment does not make any evidentiary distinction between the deprivation of "property" and "liberty."

The petitioner was denied due process under the Fifth Amendment by being deprived of property without due process of law in the court's award of attorney fees and costs.

CONCLUSION

Because the Ninth Circuit have disregarded mandated Federal Regulations in approving an unlawful labor-charging of Hughes Aircraft Company, the writ should be granted to reverse the summary judgment ruling and award of attorney fees and costs. This case should be remanded back to the District Court for trial on the issue of damages suffered by the Government by this unlawful labor-charging practice.

Respectfully submitted,

DON H. HAYCOCK,
Petitioner and Relator on behalf of
the United States Government

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APPENDIX 1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., DON H. HAYCOCK, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 94-55620 94-55826 D.C. No. CV-90-01977-KN ORDER (Filed Dec. 6, 1996)

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.*

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX 2

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel., DON H. HAYCOCK, Plaintiff-Appellant, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 94-55620 94-55826 D.C. No. CV-90-01977-KN MEMORANDUM* (Filed Oct. 6, 1996)

Appeal from the United States District Court for the Central District of California David V. Kenyon, District Judge, Presiding

Argued and Submitted September 15, 1995
Pasadena, California

Before: T.G. NELSON and KLEINFELD, Circuit Judges, and WILKEN, District Judge.**

After reviewing the record *de novo*, *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994), we conclude that Haycock presented no evidence of fraud or

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

false statement. We are unable to identify, in the evidence submitted, fraudulent allocations of employees to the direct as opposed to the indirect categories, double billing, or fraudulent accounting practices. Nor can we identify a cost accounting standard which Appellee was required to follow and did not follow. There is no evidence in the record which we have been able to find to show that Appellee improperly classified any indirect costs as direct costs, or overcharged for any of the fringe benefits and other entitlements associated with waiver costs. Whatever may have been arguable was disclosed to and approved by the government, so far as the evidence in the record shows.

Nor is there any evidence in the record to show a false certification under the Truth in Negotiations Act, 10 U.S.C. § 2306a(a), or false statement of cost or pricing data. 10 U.S.C. § 2306a(a)(2).

The district judge had discretion to award attorney's fees if it found that the relator's claim was "clearly frivolous," 31 U.S.C. § 3730(d)(4), and it did. This standard is met if "the plaintiff continued to litigate after" his claim "clearly became" groundless or without foundation. *Hughes v. Rowe*, 449 U.S. 5, 15 (1980). Our review of the attorneys' fees award is limited by the abuse of discretion standard. *In re Washington Public Power Supply System*, 19 F.3d 1291, 1296-97 (9th Cir. 1994). The district court was within its discretion in awarding attorneys' fees, as it did, for the period after Hughes served on the relator declarations of the relevant government officials showing that the cost allocation system was known to, and approved by, the government.

The district court's denial of his motion for reconsideration of the attorneys' fees award is reviewed for abuse of discretion. *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994). The court was within its discretion in concluding the expert witness declaration filed by Haycock added nothing new on the question whether the relator should have stopped litigating after the disclosures which showed absence of fraud or false statement.

Appellee's request for attorneys' fees on appeal is denied. *See* Fed. R. App. P. 38; *Amwest Mortg. Corp. v. Grady*, 925 F.2d 1162, 11[illegible]5, (9th Cir. 1991) (attorneys fees not awarded where appeal not "clearly meritless").

AFFIRMED.

APPENDIX 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

United States of America *ex rel* Don H. Haycock, Plaintiff, v. Hughes Aircraft Company, Defendant.	CV 90-1977 KN ORDER Re: Motion to Dismiss and Motions for Summary Judgment (Filed Mar. 4, 1994)

Based on the papers submitted, the Court rules as follows:

1. The Court does not decide Defendant's motion to dismiss portions of the Second Amended Complaint ("SAC") based on the statute of limitations because Plaintiff's underlying claims lack merit and therefore, as discussed below, granting Defendant's motion for summary judgment disposes of this case.

* * *

2. Plaintiff's motion for summary judgment is **DENIED.** The best that can be said of Plaintiff's papers is that they are misguided, the assertions made are unsupported by admissible evidence, and in form they fail to comply with the Federal and Local Civil Rules. The Court is given little if any guidance as to where to look for support for Plaintiff's assertions; and, despite the fact that the Court has undertaken to discover admissible evidence which might support Plaintiff's arguments by

independently reviewing the mass of documentation submitted, no such evidence can be found. At most, Plaintiff has put forth evidence that Defendant's employees charged their time on an allocation basis. The problem is that as Defendant convincingly explains in its motion for summary judgment, this allocation system was disclosed to, and investigated and approved by, the government.

3. Defendant's motion for summary judgment is **GRANTED**. In addition to adopting the vast majority of Defendant's Statement of Uncontroverted Facts and conclusions of Law, and signing Defendant's proposed Order granting summary judgment (with one paragraph excepted), the Court adds the following observations:

> The crux of Plaintiff's dispute with Defendant's theory of the case appears to be that any disclosure by Hughes and/or approval by the government of using the allocation system of
>
> * * *
>
> Charging certain labor costs was limited to a small number of specific categories of technical managers and therefore did not include any other supervisory or manager-level employees or their secretaries. Such a reading of the record may be understandable if one looks only at certain documents (and for this reason the Court does not find it appropriate to impose sanctions against Plaintiff).[2] Nevertheless, other than

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[2] For example, in a letter of August 24, 1983, Hughes' controller wrote to the government mentioning the reclassification of "assistant, associate and laboratory and department managers." Brunmier Decl. I at 65. Mr. Slater's Report of April 25, 1984, and Mr. Brunmier's memo of May 10, 1984, also both referred only to reclassification of specific

Plaintiff's unsupported assertions to the contrary, the undisputed facts in the record show that, according to the government officials then responsible for ensuring that Hughes was (1) properly charging its labor costs and (2) adequately disclosing its charging policies, there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,*and other *support personnel.* Slater Decl. ¶¶6, 7, 8, 10, & 11; Brunmier Decl., ¶13(c), (d); Defendant's Reply of January 19, 1994 at pp. 24-29. Plaintiff has offered no evidence to contradict or question the testimony of these declarants (nor, apparently, has Plaintiff deposed them). And, the most important document language – that which is set forth in Hughes' Disclosure Statements – is clearly not limited in the way Plaintiff suggests. *E.g.* Brunmier Decl. at p. 71. [Item 2.50] The record is thus uncontroverted that the government had no complaints, and was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system.

IT IS SO ORDERED.

DATED: March 4, 1994

/s/ David V. Kenyon
DAVID V. KENYON
UNITED STATES
DISTRICT JUDGE

---

categories of managers. *Id.* at 184, 188. And, no explicit mention of secretarial time was made until the December, 1986 Disclosure Statement. *Id.* at 173.

APPENDIX 4

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Attorneys for Defendant,
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA ex rel. DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) (kas) ~~[PROPOSED]~~ ORDER GRANTING MOTION FOR AWARD OF ATTORNEYS' FEES PURSUANT TO 31 U.S.C. § 3730(d)(4), FED. R. CIV. P. 11 AND LOCAL RULE 16.10 (Filed May 9, 1994)

On April 7, 1994, defendant Hughes Aircraft Company ("Hughes") filed its Motion for Award of Attorneys' Fees Pursuant to 31 U.S.C. § 3730(d)(4), Fed. R. Civ. P. 11 and Local Rule 16.10.

BASED ON THE PAPERS SUBMITTED, THE COURT RULES as follows:

FACTS

Relator, Don H. Haycock, filed a *qui tam* lawsuit under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, against Hughes in April 1990. After the original and a first amended complaint were dismissed on Hughes' motion for lack of particularity under Rule 9(b), Haycock filed a Second Amended Complaint in October 1992. In his complaint, Haycock alleged that Hughes violated the False Claims Act by charging the labor hours of certain employees working in Hughes' Systems Engineering Laboratory ("SEL") of the Electro-Optical and Data Systems Group ("EDSG") in a manner that was inconsistent with what Hughes had disclosed to the government in its CAS Disclosure Statements during the period from 1983 through 1987.

During discovery, Haycock testified that prior to filing his lawsuit, he had never read Hughes' CAS Disclosure Statements, was unaware of what Hughes had disclosed to the government pertaining to the method of labor charging for SEL employees and was uninvolved in Hughes' determination of which SEL employees should charge directly to contracts and which should charge to indirect accounts. During discovery, it became clear that Haycock had not even been aware of the use by SEL employees of an "allocation system" of timecharging, whereby the employees charged all of their labor time to one account number, which was then spread by a computerized algorithm across a predetermined base of contracts benefited by the labor efforts of such employees. Toward the end of discovery, Haycock stated in a letter to Hughes' counsel that, if what the Hughes' witnesses had been saying in their depositions was true – that the

government was aware of the method of timecharging to direct accounts through an allocation system used in the SEL and had approved that system – then he would have no case and would have to "fold". In reliance on that representation, although Haycock had never requested such documents from Hughes, Hughes voluntarily provided to Haycock its CAS Disclosure Statements for the relevant timeframe and the government's approval letters, which showed that the timecharging method of charging certain employees' time directly to contracts through an allocation system had been disclosed to and approved by the government.

Even after receiving the documentary evidence proving that Haycock's allegations were without merit, Haycock refused to drop his case and, instead, on December 20, 1993, filed a summary judgment motion in support of which he provided no admissible evidence whatsoever. Also on December 20, 1993, Hughes served on Haycock its motion for summary judgment, together with accompanying declarations and exhibits, which included a declaration of the former Resident Auditor of the Defense Contract Audit Agency with cognizance over the accounting and timecharging practices at issue in Haycock's complaint and a declaration of the former Principal Administrative Contracting Officer ("PACO") of the Air Force Plant Representative Office, who had responsibility for ensuring that Hughes was properly charging its labor costs in compliance with the applicable cost standards and adequately disclosing its charging policies. Attached as exhibits to the PACO's declaration were the approval letters he had sent to Hughes in 1984 pertaining to Hughes timecharging practices, as disclosed in its CAS

Disclosure Statements for 1983 (which timecharging practices relevant to the issues in the case at bar remained largely unchanged during the rest of the 1980's).

As this Court found, both of such declarants testified under oath that, during the 1983 through 1987 timeframe at issue in the complaint, "there was full disclosure, discussion, consideration, and approval of the use of direct allocation pools for charging the time of *managers, supervisors, secretaries,* and other *support personnel.*" (Court Order Re: Motion to Dismiss and Motions for Summary Judgment, Case No. CV 90-1977 KN, entered March 8, 1994, p. 4 ("Court Order").)

Notwithstanding the declarations of the then-cognizant government officials showing definitively that Hughes had disclosed the allocation system at issue in the complaint to the government and had received the government's approval for using that system of timecharging throughout the EDSG, Haycock refused to dismiss his case. Thereafter, Haycock's conduct in continuing the litigation, which was clearly for no other purpose than to harass Hughes, forced Hughes to expend significant resources in defending itself, including responding to Haycock's wholly unsupported summary judgment and to his equally meritless opposition to Hughes' motion for summary judgment, appearing at a hearing on a discovery motion brought by Haycock at which Haycock inexplicably failed to appear, and preparing and filing statutorily-required pretrial documents in preparation for the pretrial conference that was scheduled to take place shortly after the Court took the parties' summary judgment papers under submission.

As this Court found in granting Hughes' motion for summary judgment, the declarations of the then-cognizant government officials showed conclusively that Haycock's allegations had no merit and that "the record in thus uncontroverted that the government had no complaints, was not in any way deceived or defrauded, by Defendant Hughes' direct allocation pool cost charging system." (Court Order, p. 5.)

DISCUSSION

By the present motion, Hughes seeks to recover its attorneys fees and costs expended in defending this lawsuit since December 20, 1993 (the date of service of the declarations of the individuals who were the then-cognizant government officials) on the grounds that Haycock's continuance of the litigation and refusal to dismiss his case, despite the fact that he clearly had no evidence to support his allegations or controvert the sworn testimony of the then-cognizant government officials, was done for no purpose other than to harass Hughes. As of that date, it was evident that Haycock's lawsuit was clearly frivolous, clearly vexatious and clearly maintained for purposes of harassment. As such, Hughes is entitled to recovery of its attorneys fees and costs pursuant to 31 U.S.C. § 3730(d)(4) ~~and Federal Rule of Civil Procedure 11.~~ Kas (*United States ex rel. Herbert v. National Academy of Sciences*, 1992 U.S. Dist. LEXIS 14063 (D.D.C. 1992); *Davis v. Mason County*, 927 F. 2d 1473, 1488 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 275, 116 L.Ed. 2d 227 (1991).)

CONCLUSION

For all of the foregoing reasons, the Court HEREBY GRANTS Hughes' Motion for Attorneys' Fees. Hughes is hereby awarded $ 146,754.59 in attorneys' fees and expenses.

Dated: MAY -9 1994

/s/ DAVID V. KENYON
United States
District Judge

Presented by:
McKenna & Cuneo
JAMES J. GALLAGHER
FRED D. HEATHER
SUSAN B. MYERS
DANA F. GARDNER

By: /s/ Susan B. Myers
Susan B. Myers

APPENDIX 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 90-1977 Kn **Date** June 1, 1994

Title United States, ex rel. Donald H. Haycock v. Hughes Aircraft Company

DOCKET ENTRY

PRESENT:

HON. DAVID V. KENYON, **JUDGE**

Lenora Pulliam	None
Deputy Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	**None**

PROCEEDINGS:

IN CHAMBERS:

The Court has received Relator Haycock's motion for reconsideration of the Court's Order awarding attorneys fees to Defendant Hughes. The motion for reconsideration is predicated on a declaration from Relator's expert vis-a-vis the substantive issues of whether Hughes violated the False Claims Act. The declaration is presented for the first time. Its substance consists mostly of a review of the evidence already presented to this Court, and an interpretation thereof concluding that Hughes violated the False Claims Act.

The Court has already ruled – based on the only evidence timely submitted – that Relator failed to prove that there were any False Claims Act violations. The Court also found that the Defendant was entitled to attorneys fees beginning at the time it was made clear to Relator that no violations had occurred.

At this point, the Court is not inclined to reconsider either earlier ruling based on this so-called "new" evidence. Enough attorney time has already been expended litigating this case. If Relator thinks this Court has erred in its determinations, he is free to appeal. Accordingly, the Court will not require Hughes to file an opposition to Relator's reconsideration motion, which the Court hereby **DENIES**.

IT IS SO ORDERED.

APPENDIX 6

Don H. Haycock,
Attorney at Law
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Los Angeles, CA 90045

ON BEHALF OF, AND FOR , PLAINTIFF
UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

EX REL. DON H. HAYCOCK UNITED STATES OF AMERICA Plaintiff, vs, HUGHES AIRCRAFT COMPANY Defendant.	NO. 90 1977 KN(TX) DECLARATION OF EXPERT WITNESS PETER ELLIOTT

I, PETER ELLIOTT, declare as follows: I make this declaration on behalf of the Relator in this lawsuit, Don H. Haycock, with whom I have consulted and advised regarding the time charging practices of defendant Hughes Aircraft Company ("HUGHES") and agreed to offer the following testimony at the trial of this lawsuit, should that have occurred.

I make this declaration as an expert in the field of government contracting, and particularly with regard to government regulations of cost accounting standards, requirements and violations. My qualifications as an

expert in this field is presented in part A, The Experience, Training and Education of Peter Elliott.

I have personal knowledge of the Federal Regulations and Requirements that I have applied to the facts disclosed in the documents that I have relied upon, and as disclosed to me by Relator, both as referenced herein. I can competently testify under oath of the conclusions I have made herein based upon these facts.

A.

THE EXPERIENCE, TRAINING AND EDUCATION OF PETER ELLIOTT

PETER ELLIOTT, CPA, is President/Senior Executive Accountant, with Peter Elliott Accountancy Corporation (PEAC), Inc. and also President of Government Contracts Advisory and Litigation Support Services Corporation (GCALSS). PEAC is a firm which provides accounting, auditing, and tax services, and specialized consulting services in Government contracts, grants and terminations. These services are designed to assist clients in resolving contractual disputes and termination problems, and in improving client's accounting systems consistent with Federal contract, grant, regulations and cost accounting standards requirements.

Mr. Elliott's prior affiliations as a Consultant include Contracts Advisory Services, Astro Vista Inc., and with the Department of Government Contracts of Peat, Marwick, Mitchell & Co. in the Los Angeles office. His principle area of assistance relating to management and accounting systems include (1) preparation of proposals, (2) preparation and negotiation of cost and insurance

claims, (3) accounting records reconstruction, and (4) determination of allowable costs against contracts and grants, including development of rates for indirect cost recovery in accordance with various government agencies regulations.

During his career Mr. Elliott has had diverse experience such as: Industrial Engineering Assistant; Computer Programer [sic]; Military Pilot; Military Aircraft and Engine Mechanic; Auditor, Public; Auditor, Government; owner of an accounting firm providing a full spectrum of service including tax and auditing services.

His most recent experience over and above the usual proposals, terminations, systems and accounting matters are Board of Contract Appeals Cases, including Value Engineering, Equal Access to Justice Act, Equitable Adjustment of Contracts, and commercial litigation support. He has been qualified and appeared as an expert witness before the Armed Services Board of Contract Appeals and the California Superior Court and has been qualified as an expert witness before the Federal District Court of Los Angeles.

Mr. Elliott received his BS in Accounting from California State Polytechnic College, an AA in Mathematics and Science from Chaffey College, and has done post graduate work in Business Finance at the California State University, Fullerton. He is a Certified Public Accountant in California and a member of the California Society of Certified Public Accountants, the American Institute of Certified Public Accountants, and the National Contract Management Association.

B.

INFORMATIONAL SOURCES

Following are the factual and authoritative sources of information on which I have relied in making my evaluations and conclusions stated in this declaration:

1. Declarations of Allan E. Brunmier. Mr. Brunmier states that he was a member of the Air Force Plant Representative Office ("AFPRO"), the governmental agency primarily responsible for the administration of government contracts from 1967 to 1986. During this period he states that he had cognizance over the Hughes facilities located in El Segundo, California, which include the time charging practices of the organization challenged in this lawsuit, the Systems Engineering Laboratory ("SEL"). In 1982 he states that he became the Principal Administrative Contracting Officer (PACO) with responsibility for overseeing all the contract administrative functions of the AFPRO, including pricing, business management and contract administration. This included the Electro-Optical and Data Systems Group, the parent of the SEL. He is now an employee of Hughes.

Mr. Brunmier provided two declarations, one on December 20, 1993 and one on January 13, 1994. In his December 20, 1993 declaration he provided the chronology of the notices, correspondence and cost impact analyses performed by Hughes pursuant to the Amendments Hughes made to the Cost Accounting Standards ("CAS") Disclosure Statements ("Disclosure Statements") from October 1983 through to December 1986. (However, it is noted that in 1986 Mr. Brunmier declares that he left government service and started working for Rockwell

International, Inc.) This includes relevant dates when Hughes informed the government of Disclosure Statement Amendments and the required Cost Impact Proposals Hughes submitted, or when then should have been submitted, under FAR clause 52.230-4, *Administration of Cost Accounting Standards* (1984 through 1987), the applicable FAR clauses during this period from October 1983 through to December 1987. The FAR Clause 52-230-4 was revised in 1992 and these provisions were incorporated in FAR Clause 52-230-4 without any changes to these requirements. The pertinent portions of FAR Clauses of 52.230-4 that were in effect from October 1983 through December 1987 are presented on App. 26 herein. The April 1984 Revision did not change these requirements from the revision in effect in October 1983.

Mr. Brunmier's December 20, 1993 declaration will be referenced throughout this declaration.

2. Declaration of Hughes Employee Robert Meyers. From 1979 to 1986 Mr. Meyers states he was the Division Controller of two Hughes Divisions, both within EDSG. In this capacity he managed the finance departments of these divisions, one being the parent division to the SEL.

3. Declaration of Dudley P. Slater. From 1983 until 1988 Mr. Slater states that he was assigned to the Defense Contract Audit Agency ("DCAA") office of Hughes as Resident Auditor with cognizance over all audit functions. From 1983 to 1985 he had specific responsibility of EDSG, the parent organization of the organization which is the subject of this lawsuit, the SEL.

4. The Following Representations of Relator.

(a). That from November 1984, or before, secretaries time in the SEL was being charged to allocated direct via a computerized system that Hughes refers to as the "allocation system."

(b). That in the last quarter of 1984 and beyond the time of indirect SEL employees, other than secretaries and technical laboratory and department managers, was also being charged to allocated direct via the "allocation system."

(c). That from the first part of 1984 the time of non-technical department managers in the SEL was being charged to allocated direct via the "allocation system."

5. Government Laws and Regulations

(1). 31 U.S.C. 3730 *The False Claims Act*

(2). FAR Paragraph 30.401 (CAS 401) *Cost Accounting Standard – Consistency in Estimating, Accumulating and Reporting Costs*

(3). FAR Paragraph 30.401.20 (CAS 401.20) *Purpose*

(4). FAR Paragraph 30.401.40 (CAS 401.40) *Fundamental requirements*

(5). FAR Paragraph 30.401.50 (CAS 401.50) *Techniques for application*

(6). FAR Clause 52-230-4 (1984-1987 Revisions) *ADMINISTRATION OF COST ACCOUNTING STANDARDS*

(7). Title 4, *Code of Federal Regulations.* Chapter III, General Accounting Office (CASB), January 1, 1983 Rev.

(a). Para. 331.50 *Contract Clause – Cost Accounting Standards*

(b). Para. 331.71 *Materiality*

(c). Para. 351.130 *Instructions and information*

C.

GOVERNMENT REGULATIONS AND REQUIREMENTS FOR COMPLIANT ACCOUNTING OF CONTRACT COSTS

1. Hughes Knew How to Effect Accounting Changes. An important issue is whether the time charging practice of certain Hughes employees in the SEL from 1983 through to 1987 resulted in the violation of FAR Paragraph 30.401 (or preceding regulation) *"Cost Accounting Standards – consistency in estimating, accumulating and reporting costs."* And, if so, was it done intentionally and what liability does this impose?

The time charging practice involved charging the time of formally indirect employees to "allocated direct" via the "allocation system" which included a data base made up of contracts in which some of the SEL employees were properly authorized to charge direct. The expressed criteria for selecting these contracts to which the indirect SEL employees time would be charged as "allocated direct" was, " . . . the totality of the contracts to which employees supervised by the lab managers charged their time." (*See* Declaration of Robert Meyers, App. 60 para 9)

Hughes claims the practice of redistributing indirect labor to "allocated direct" was disclosed by a CAS Disclosure Statement Amendment of October 31, 1983 and

that this disclosure was sufficiently broad to authorize an allocation based on the " . . . labor distribution of supervised individuals." The disclosure is as follows: (Item No. 2.5.0 of Disclosure Statement Amendment of October 31, 1983)

> "Y. Other
>
> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals." (Brunmier's declaration, Appendix 7 Exhibit B1, page App. 43.)

Hughes also submitted a Cost Impact Proposal (statement) to the government, for its review and acceptance, which included in this "allocation system" only five specific job classifications of technical laboratory and department managers. On April 25, 1984 the Defense Contract Audit Agency ("DCAA") reviewed this cost impact statement (*See* Brunmier's declaration, Appendix 7, Exhibit F page App. 49). On May 10, 1984 the Principal Administrative Officer also accepted this cost impact statement (*See* Brunmier's Declaration, Appendix 7, Exhibit H pages App. 55 & 56)

Clearly, Hughes knew the FAR regulations for implementing accounting changes to its CAS covered contracts. Particularly, that a Cost Impact Proposal is required and must be reviewed and accepted by the government representative responsible for Hughes contracting activities. As presented, this is mandated by FAR Clause 52-230-4, which would have been included in all CAS covered contracts in 1983 to 1987:

"52-230-4 Administration of Cost Accounting Standards.

For the purpose of administering the Cost Accounting Standards (CAS) requirements under this contract, the Contractor shall take the steps outlined in (a) through (f) below:

(a). Submit to the cognizant Contracting Officer a description of any accounting change, the potential impact of the change on contracts containing a CAS clause, and if not obviously immaterial, a general dollar magnitude cost impact analysis of the change which displaces the potential shift of costs between CAS-covered contracts by contract type (i.e. firm-fixed-price, incentive, cost-plus-fixed-fee, etc.) and other contractor business activity. As related to CAS-covered contracts, the analysis should display the potential impact of funds of the various Agencies/Departments (i.e., Department of Energy, National Aeronautics and Space Administration, Army, Navy, Air Force, other Department of Defense, other Government) as follows:

(b). Submit a cost impact proposal in the form and manner specified by the cognizant Contracting Officer within 60 days (or such other date as may be mutually agreed to) after the date of determination of the adequacy and compliance of a change submitted pursuant to (a) above. If the above proposal is not submitted within the specified time, or any extension granted by the cognizant Contracting Officer, an amount not to exceed 10 percent of each payment made after that date may be withheld until such time as a proposal has been provided in the form and manner specified by the cognizant Contracting Officer."

It has been revealed that three of Hughes time charging practices changes violated this provision by not submitting to the government a Cost Impact Proposal when these additional indirect employees were reclassified "allocated direct" and included in the "allocation system."

The cost effect of not notifying the government of changes in accounting practices, and providing a Cost Impact Proposal, is that an inconsistency is created in the way costs are estimated, and the way actual costs are accumulated and reported. This is the expressed purpose of FAR Paragraph 30.401, which states as its purpose;

"401.20 Purpose

> The purpose for this Cost Accounting Standard is to insure that each contractor's practices used in estimating cost for a proposal are consistent with cost accounting practices used by him in accumulating and reporting costs. Consistency in the application of cost accounting practices is necessary to enhance the likelihood that comparable transactions are treated alike . . . "

A Contractor violates FAR CAS 401 when he proposes estimated costs as indirect and then, without informing the government, by the prescribed notice, cost impact and Disclosure Statement Amendment, he accumulates and reports those costs as direct costs. This causes inaccuracies in the pricing and costing processes that the requirements of FAR CAS 401.40 would preclude:

"401.40 Fundamental Requirement

(a) A contractor's practice used in estimating costs in pricing a proposal shall be consistent with his cost accounting practices used in accumulating and reporting costs.

(b) A contractor's cost accounting practices used in accumulating and reporting actual costs for a contract shall be consistent with his practices used in estimating in pricing the related proposal.

(c) . . . "

FAR CAS 401.50 describes how this requirement of consistency of costs shall be applied:

"401.50 Techniques for Application.

(a) . . . costs estimated for proposal purposes shall be presented in such a manner and in such detail that any significant cost can be compared with the actual cost accumulated and reported therefore. In any event the cost accounting practices in estimating costs in pricing a proposal and in accumulating and reporting costs on the resulting contract shall be consistent with respect to:

(1) The classification of elements or functions of cost as direct or indirect;

(2) the indirect cost pool to which each element or function of cost is charged or proposed to be charged; and,

(3) the method of allocating indirect costs to the contract."

If an accounting change is made that affects how costs are estimated, and how they are accumulated and

reported, the change must be applied *prospectively* to the affected contract and an equitable adjustment negotiated for each affected contract (4 *Code of Federal Regulations*, Chapter III, para. 331.50(a)(4), (1983 Rev.)

Therefore, the issue is whether or not Hughes violated FAR CAS, Part 401 by charging the time of indirect employees to "allocated direct", without following the prescribed procedure and an analyses of the cost impact to each affected contract, as mandated by FAR clause 52-230-4,

D.

THE TIME OF FIVE CLASSIFICATIONS OF INDIRECT TECHNICAL MANAGERS WAS PROPERLY CHARGED TO ALLOCATED INDIRECT

On October 4, 1983 Hughes submitted an amended Disclosure Statement Amendment for the Electro-Optical and Data Systems Group ("EDSG") Engineering Divisions dated October 31, 1983 (Brunmier's declaration, Appendix 7 Exhibits B2, B3 and F pages App. 44, 45 and 49 respectively). This Amendment included an accounting change that incorporated reclassifying five (5) specific Job Codes of technical laboratory and department managers so their time could be charged to "allocated direct," specifically:

Job Code	Title/Description
21823	Manager Technical Department
11002	Assistant Manager, Tech. Dept.
12428	Associate Manager, Tech. Dept.
11008	Assistant Manager, Tech. Lab.
12457	Associate Manager, Tech. lab.

A Cost Impact Proposal (statement) was provided, and on April 25, 1984 (Exhibit F of Brunmier's Declaration, page App. 49) there was a response from the office of the Resident Auditor, Dudley P. Slater, accepting the cost impact analyses; and, the reclassification from indirect to direct of the five job codes of laboratory and department technical managers. After the effective date of the Disclosure Statement Amendment the time charges of the managers having one of these job code classifications could properly and lawfully be charged to "allocated direct" via the "allocation system." This acceptance did not extend to any other employees. Although the government accepted the Cost Impact Proposal (statement) six months after submittal of the Disclosure Statement Amendment the date relates back to the date of the Disclosure Statement Amendment of October 31, 1983. Hughes notified the government, provided a cost impact statement and a Disclosure Statement Amendment.

This Amendment, for reclassifying these technical manager "allocated direct," is as follows: (Disclosure Statement Amendment of October 31, 1983, Item 2.50)

"Y. Other

A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, both which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals."

E.

THERE WAS NO RECLASSIFICATION OF INDIRECT NON-TECHNICAL MANAGERS FOR THEIR TIME TO BE CHARGED TO ALLOCATED DIRECT

The government's response to the Cost Impact Proposal (statement) of April 25, 1984, referenced in D, above, makes no reference to non-technical laboratory or department managers and secretaries being included with the specific five classifications of technical managers (Appendix 7, Exhibit H of Brunmier's Declaration page App. 55). There is no cost impact analyses (statement) or any indication the government has even been notified, with the exception of secretaries on December 30, 1985, of their reclassification to "allocated direct". For any of these non-technical managers to charge their time to the "allocation system" would be contrary to the requirements of the Cost Accounting Standards.

Hughes cannot slip them in under the CAS Disclosure Statement Amendment just because it is claimed that it is broad enough to include them. 4 *Code of Federal Regulations,* Chapter III, para. 351.130 (1983 Rev.) clearly prohibits this:

> "351.130 Instructions and Information.
>
> (c) The disclosure of a cost accounting practice by a contractor does not determine the allowability of particular items of cost. Irrespective of the practices disclosed by a contractor, the question of whether or not, or the extent to which, a specific element of cost is allowed under a contract remains for consideration in each specific instance. Contractors are cautioned that the determination of the allowability of cost

> items will remain a responsibility of the contracting officers pursuant to the provisions of the applicable procurement regulations."

The August 24, 1983 letter recitation of T.L. Dougherty, Controller (Appendix 7 Exhibit B3 of Brunmier's Declaration page App. 45) that these non-technical managers are included in the "allocation system" is not material since there was no Cost Impact Proposal (statement) submitted to the government identifying the cost impact of their inclusion (*See* 52-230-4 Administration of Cost Accounting Standard herein.) Also, the same recitation of Allan E. Brunmier in his letter of May 10, 1984 (Appendix 7 Exhibit H of Brunmier's Declaration page App. 55) is equally not material and can only be a mistaken assumption by him that they were included. Since Hughes had previously submitted the Cost Impact Proposals (statement) for five job classifications of technical managers and later secretaries, that the DCAA Auditors accepted, Hughes and their employees knew the required practice for reclassifying employees to "allocated direct" in order to charge their time via the "allocation system." They were to treat the reclassification of indirect non-technical managers as an accounting change. It was an accounting change since these non-technical managers were now being charged direct. Further, they now are estimated as indirect while their actual costs were being accumulated and reported as direct.

When a contractor is fully covered by Cost Accounting Standards, a Contracting Officer cannot by edict conclude there is no cost impact without a cost impact analyses (statement). Every accounting change requires a Disclosure Statement Amendment that documents the

date that the accounting change, for which it was prepared, is to become effective; and should describe the accounting change. Hughes did prepare and submit a Disclosure Statement Amendment incorporating technical managers (by job classification) and secretaries with cost impact statements. This practice should have been followed for each job classification and every individual that was reclassified to the "allocated direct" category or classification.. Hughes was reclassifying employees to "allocated direct" based only on an arbitrary determination by the Division Controllers that it was authorized by an employee's " . . . job classification, function and assignment." Without a cost impact analyses for each of these reclassification the practice is contrary to Cost Accounting Standards under government regulations relating to cost estimating. (*See* Appendix 8 para. 11 of Robert Meyers' Declaration at page App. 61) I am skeptical that this procedure is authorized in the Hughes practices on time-charging as Mr. Meyer states in his declaration. (Appendix 8 of his Declaration at page App. 57)

Without a Disclosure Statement Amendment and a cost impact analyses, changes in the classification of non-technical managers from indirect to direct in order for them to charge their time direct to contract via the "allocation system" violates Cost Accounting Standards.

F.

THE CHARGING OF SECRETARIES' TIME FROM INDIRECT TO ALLOCATED DIRECT UP TO DECEMBER 30, 1985 WAS IMPROPER

On August 28, 1986 Hughes submitted by letter a Disclosure Statement, dated December 30, 1985, to amend

the CAS Disclosure Statement, dated October 1, 1984, to reclassify secretaries from indirect to direct so their time could be charged to "allocated direct" via the "allocation system" (Brunmier's declaration, Appendix 7 Exhibit D page App. 47) This reclassification was not indicated in the October 31, 1983 Disclosure Statement or in the October 1, 1984 Disclosure Statement. This Amendment is as follows: (Disclosure Statement Amendment dated December 30, 1985, Item No. 2.5.0)

> "Y. Other
>
> A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The accounts collect actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals. Secretaries reporting to individuals who are direct will also be classified direct."

The above referenced letter of August 28, 1986 makes the following statement regarding a Cost Impact Proposal (statement):

> "The cost impact statement for the changes was submitted December 1985." (For the December 30, 1985 Disclosure Statement Revision)

However, if the time of secretaries was already being charged to "allocated direct" via the "allocation system" prior to the effective date of this Disclosure Statement Amendment of December 30, 1985, this would be a violation of the Cost Accounting Standards if during this

period there had been no disclosed accounting change related to the secretarial job classifications.

G.

THE MOST OBVIOUS VIOLATION OF FAR CAS 401 IS ROBERT MEYERS' ADMISSION OF RECLASSIFYING EMPLOYEES FROM INDIRECT TO DIRECT IN ORDER TO CHARGE THEIR TIME VIA THE "ALLOCATION SYSTEM"

Mr. Meyers acknowledges in his declaration (Appendix 8, page App. 57) that it was the duty of the division controller to "formally authorize" employees to change their classification from indirect to "allocated direct" and charge their time to contract direct via the "allocation system." (Appendix 8, para. 10 page App. 60) Mr. Meyers further states in his declaration:

> "11. Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system and the supervised employees over which the supervisor's time would be allocated. This determination was made based upon a review of each employee's job classification, function and assignment. Pursuant to EDSG practices, authorized lab managers and their secretaries were eligible to be on the allocation system." (Appendix 8, page App. 61)

By this practice it appears the EDSG division controllers were arbitrarily reclassifying indirect employees, to "allocated direct" for inclusion in the "allocation system," based on considerations other than the disclosed job classifications. There is no Disclosure Statement Amendment

that identifies this practice and there has been no identified Disclosure Statement made to the government for such an accounting change which we are aware. Also, the government should not approve such broad discretion, since each job classification would have to be identified (as they had previously disclosed) before being reclassified under the provisions of FAR Contract Clause 52-230-4. This practice could result in a cost impact to each of the CAS Covered contracts each of these indirect employee, that was reclassified from indirect to "allocated direct," and charged time "allocated direct" via the "allocation system." As presented above, FAR CAS 401 prohibits this change without a Disclosure Statement Revision and a cost impact analyses. The cost for these indirect employees cannot be estimated as indirect, then during the performance periods of these contracts arbitrarily reclassified direct so actual costs will be accumulated and reported as if they were direct employees. Under the above stated FAR Paragraphs and Clauses, and other regulations discussed above, there should have been both a cost impact analyses, and a Disclosure Statement revision effective on the date of the job classification change from indirect to direct for each of these employees. It appears that the Cost Accounting Standards requirements and the cost impact analyses were not satisfied, as indicated by 4 *Code of Federal Regulations,* Chapter III, para. 331.71. (1983 Rev.)

"331.71 Materiality

(3) The relationship between a cost item and a cost objective. Direct cost items, especially if the amounts are themselves part of a base for

allocation of indirect, will normally have more impact than the same amount of indirect costs."

Contract indirect costs are generally determined by multiplying the number of estimated Direct Labor Dollars by an overhead or burden rate, thereby giving a sufficient estimate to cover the overhead. Clearly, it could be to Hughes advantage to exchange indirect labor for direct labor, as in the reclassification to "allocated direct." was doing with the correct mix of cost-type and fixed-price contracts.

As presented above, the only job classifications disclosed for charging to "allocated direct" via the "allocation system" are those five specific classifications of technical managers after October 31, 1983 and their secretaries after December 30, 1985. Any Hughes practices permitting the divisions controller to randomly assign employees to the "allocation system;" or, authorize other than the five job classifications and their secretaries to charge direct labor via the "allocation system" is in violation of FAR CAS 401.

H.

CONCLUSION

Based on the information provided me, it is my opinion that the United States government would be entitled to assess damages under 31 U.S.C. The False Claims Act for:

(a). The cost impact of the SEL secretaries charging direct via the "allocation system" prior to December 30, 1985;

(b). The cost impact of non-technical indirect SEL laboratory and department managers charging direct via the "allocation system;"

(c). The cost impact of all indirect job classifications whose time was charged to allocated direct at the direction of the Division Controllers, which has not been disclosed to the government.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT, AND FURTHER DECLARE THAT THIS DECLARATION WAS EXECUTED ON MAY 31, 1994 IN SANTA ANA, CALIFORNIA.

/s/ Peter Elliott
PETER ELLIOTT

APPENDIX 7

JAMES J. GALLAGHER
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Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF ALLAN E. BRUNMIER SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT

I, Allan E. Brunmier, declare as follows:

1. I make this Declaration on behalf of Hughes Aircraft Company ("Hughes"). I have personal knowledge of the following and if necessary could testify competently thereto.

2. I was a member of the Air Force Plant Representative Office ("AFPRO"), the governmental agency

assigned primary responsibility for the administration of government contracts, from 1967 to 1986. Throughout this time, I had cognizance over the Hughes Aircraft Company facilities located in El Segundo, California, which are at issue in this suit.

3. From 1967 to 1975, I served in the Pricing Branch of the AFPRO at Hughes El Segundo, as a price analyst; at that time, my duties included reviewing Hughes' contract proposals. From 1975 to 1982, I served in the Business Management Branch of the AFPRO at Hughes El Segundo, and was responsible for reviewing and negotiating Hughes' forward pricing and final overhead rates and costs. The Defense Contract Audit Agency ("DCAA") provided audit support for those functions. During the latter part of that timeframe, I was promoted to the Branch Chief of the AFPRO Business Management Branch.

4. In 1982, I was promoted to be the Chief of the Contract Administration Division of the AFPRO at Hughes El Segundo and the Principal Administrative Contracting Officer ("PACO"). As the PACO, I was responsible for overseeing all of the contract administrative functions of the AFPRO, including pricing, business management and contract administration. In this capacity, I had cognizance over several business units of Hughes, including the Electro-Optical and Data Systems Group ("EDSG").

5. In 1986, I left government service and accepted a position with Rockwell International, Inc. I held that position until 1991 when I accepted my current position

as Senior Government Accounting Specialist for Hughes Aircraft Company.

6. In November, 1982, Hughes submitted to my office Cost Accounting Standards Disclosure Statements ("Disclosure Statements") for the EDSG's Manufacturing Division, Engineering Division and the group home office. The EDSG Manufacturing Division Disclosure Statement disclosed, *inter alia*, a new accounting practice pursuant to which various direct labor pools would be maintained to collect labor charges, including supervision labor, to be distributed on the basis of the labor distribution of supervised employees. The concept and practice of such supervisory "allocation pools" were subsequently adopted (as of October 1983) in the EDSG Engineering Division. This accounting treatment was also incorporated into the consolidated EDSG CAS Disclosure Statement issued on October 1, 1984.

7. Attached hereto as Exhibit A is a true and correct copy of the EDSG Manufacturing Division CAS Disclosure Statement, dated January 3, 1983.

8. Attached hereto as Exhibit B is a true and correct copy of portions of the EDSG Engineering Division CAS Disclosure Statement, dated October 31, 1983.

9. Attached hereto as Exhibit C is a true and correct copy of the EDSG CAS Disclosure Statement dated October 1, 1984.

10. Attached hereto as Exhibit D is a true and correct copy of the portions of the EDSG CAS Disclosure Statement, dated December 30, 1985.

11. Attached hereto as Exhibit E is a true and correct copy of portions of the EDSG CAS Disclosure Statement, dated December 29, 1986.

12. As required by the Cost Accounting Standards ("CAS"), my office reviewed these Disclosure Statements to determine whether the accounting practices disclosed therein were: (1) adequately described in the Disclosure Statements, and (2) compliant with the Cost Accounting Standards. In connection with this review, my office analyzed the expected cost impact of the proposed changes, to determine whether the changes would increase cost to the government of Hughes' contract performance.

13. In connection with my review of the Disclosure Statements' adequacy and compliance with the Cost Accounting Standards, I determined as follows:

(a.) that the direct allocation pool practice disclosed was consistent with CAS 418, which provides for the designation of so-called "blanket costs," defined as costs that are accumulated in intermediate "cost pools" and then reallocated to contracts as direct costs;

(b.) that the direct allocation pool practice disclosed was consistent with the AFPRO's preference that costs be charged directly to contracts, rather than indirectly, wherever administratively feasible;

(c.) that the direct allocation pool practice disclosed would increase the accuracy of time-charging by supervisors, lab managers and their secretaries, because it would fairly allocate the labor costs of these employees across the totality of the contracts benefited, in direct

proportion to the charges to each contract made by the supervised employees;

(d.) that the direct allocation pool practice disclosed would improve the consistency of timecharging, because it would eliminate the arbitrary exercise of judgment of individual managers and secretaries as to whether particular tasks were properly charged as "direct" or "indirect" costs; and

(e.) that the direct allocation pool practice disclosed would not have any adverse cost impact on the government.

14. On April 25, 1984, the DCAA transmitted to my office its Report on Adequacy and Compliance Review of Disclosure Statement Revision ("Report") for the October 31, 1983 EDSG Engineering Division CAS Disclosure Statement, which set forth the DCAA's findings that the disclosed accounting practice changes regarding the implementation of the allocation pool system were adequately disclosed and compliant with the Cost Accounting Standards. A true and correct copy of the DCAA's Report, dated April 25, 1984, is attached hereto as Exhibit F.

15. On May 1, 1984, I issued to Hughes a letter which formally approved the accounting practice changes disclosed in the three November 1982 EDSG CAS Disclosure Statements. This letter reflected my finding that the accounting practices disclosed in the CAS Disclosure Statements, which had been implemented as of January 3, 1983, were adequately disclosed and complied with the Cost Accounting Standards. A true and correct copy of

my approval letter, dated May 1, 1984, to Hughes is attached hereto as Exhibit G.

16. On May 10, 1984, I issued to Hughes a letter which formally approved the accounting practice changes disclosed in the October 31, 1983 EDSG Engineering Division CAS Disclosure Statement. This letter reflected my finding that the accounting practices disclosed in that CAS Disclosure Statement, which had been implemented as of October 31, 1983, were adequately disclosed and complied with the Cost Accounting Standards. A true and correct copy of my approval letter, dated May 10, 1984, to Hughes is attached hereto as Exhibit H.

17. Throughout my tenure as the PACO, I continued routinely to approve Disclosure Statements submitted by Hughes that included a description of direct allocation pools, such as described above.

18. Disclosure of the allocation practice used by EDSG in the EDSG CAS Disclosure Statements precludes a Truth in Negotiations Act (defective pricing) violation with respect to the use of that practice, since the practice was adequately disclosed and complied with the Cost Accounting Standards.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 17 day of December, 1993 at Los Angeles, California.

/s/ Allan E. Brunmier
ALLAN E. BRUNMIER

(Exhibit B1 of Brunmier's Declaration)

Exhibit B1

Revised
Date 31 October 1983

COST ACCOUNTING STANDARDS BOARD DISCLOSURE STATEMENT *REQUIRED BY PUBLIC LAW 91-379*

CONTINUATION SHEET
Page 5a of 40 Pages

Name of Reporting Unit
EDSG – Engineering Divisions

Item No.	Item Description
2.5.0 Contd.	Y. Other

A direct labor account is maintained to collect labor charges that are impractical to individually charge to specific contracts, but which clearly benefit same. The account collects actual labor cost incurred which is then applied to contracts based upon the labor distribution of supervised individuals.

(Exhibit B2 of Brunmier's Declaration)

Exhibit B2

HUGHES AIRCRAFT COMPANY-

4 October 1983

SUBJECT: Cost Accounting Standards Disclosure Statement

TO: Air Force Plant Representative
Hughes Aircraft Company
Attn: (TM) A. Brunmier (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits the attached Disclosure Statement Amendment for the EDSG – Engineering Divisions, dated 31 October 1983.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the Government's agreement to treat each and every Disclosure Statement as confidential information (4 CFR 351.40(d)). Further, it is requested that the information be protected and not released outside the Government as provided for in DAR 3-1203(f).

HUGHES AIRCRAFT COMPANY

/s/ Paul L. Hendricks, Jr.
P. L. Hendricks, Jr., Manager
Government Accounting

TCR:smh

Attachment: a/s

cc: D. Slater

(Exhibit B3 of Brunmier's Declaration)

Exhibit B3

(213) 616-1375 **HUGHES**

HUGHES AIRCRAFT COMPANY

ELECTRO-OPTICAL & DATA SYSTEMS GROUP
PO BOX 902
EL SEGUNDO CA 90245

24 August 1983

In reply refer to: 7011.83/F007

Subject: Electro-Optical & Data Systems Group
Engineering Burden Center CASB Disclosure Statement for 31 October 1983.

To: Mr. Allan E. Brunmier
Air Force Plant Representative's Office
Hughes Aircraft Company
P.O. Box 92463
Building C2, Mail Station C140
El Segundo, California 90245

As we discussed earlier, the EDSG Engineering Burden Center disclosure statement now incorporates the following minor accounting change. (See attachment 1).

Effective 31 October 1983, assistant, associate and laboratory and department managers will be reclassified as direct employees. Their labor dollars will be allocated based on the direct hours charged of those employees directly under their supervision. This change will provide a more proper costing of direct supervision to the benefitting activity. Attachment 2 is a detailed analysis showing the immateriality of this change to existing contracts.

The EDSG Engineering Burden Center rates for 1983 and forward will be revised to incorporate this change by 1 September 1983.

Attachments

/s/ T. L. Dougherty
T. L. Dougherty, Controller
Electro-Optical & Data Systems Group

Exhibit C

HUGHES AIRCRAFT COMPANY

5 October 1984

SUBJECT: Cost Accounting Standards Disclosure Statement

TO: Air Force Plant Representative
Hughes Aircraft Company
Attention: (TM) A. Brunmier (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits a revised Disclosure Statement for Electro-Optical & Data Systems Group, dated 1 October 1984.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the confidential information (CFR 351.40(d)). Further, it is requested that

the information be protected and not released outside the Government as provided for in FAR 30.201.4.

This Disclosure Statement is a merger of EDSG Engineering, Manufacturing and Group Office Disclosure Statements.

HUGHES AIRCRAFT COMPANY

/s/ P. L. Hendricks, Jr.
P. L. Hendricks, Jr., Manager
Government Accounting

smh:TCR

Exhibit D

28 August 1986

HUGHES
AIRCRAFT COMPANY

Subsidiary of GM Hughes Electronics

SUBJECT: Cost Accounting Standards Disclosure Statement Electro-Optical and Data Systems Group

TO: Air Force Plant Representative
Hughes Aircraft Company
Attention: (TM) R. F. Kornmann (PACO)
El Segundo, CA 90245

Hughes Aircraft Company, in accordance with Subject Regulations (4 CFR 351.120), submits a Disclosure Statement Amendment for Electro-Optical and Data Systems Group, dated 30 December 1985.

The Disclosure Statement contains trade secrets and commercial or financial information which is privileged and confidential. Accordingly, the filing of Disclosure Statements is specifically conditioned on the Government's agreement to treat each and every Disclosure Statement as confidential information (CFR 351.40(c). Further, it is requested that the information be protected and not released outside the Government as provided for in FAR 30.201-4.

This revision incorporates the following changes:

1. Update name change, year and date change.
2. Incorporates revisions to Section VII regarding pension costs, a corporate responsibility, as requested by the Corporate Administrative Contracting Officer, Mr. D. Sneed, who approved these changes on 14 January 1986.
3. The minimum dollar capitalization amount effective 1989 fiscal year.
4. Descriptions, allocation base and pools to be charged for certain functions as described in summary of Disclosure Statement changes.
5. Revision to base for allocating domestic and foreign selling costs.

The cost impact statement for the changes was submitted December 1985.

HUGHES AIRCRAFT COMPANY

/s/ D. G. Illegible
for P. L. Hendricks, Jr., Manager
Government Accounting

cc: D. P. Slater (DCAA)

(Exhibit F of Brunmier's Declaration)

Exhibit F

[SEAL]

DEFENSE CONTRACT AUDIT AGENCY
LOS ANGELES REGION
EL SEGUNDO RESIDENT OFFICE
HUGHES AIRCRAFT COMPANY
200 N. SEPULVEDA BLVD (C2/C130)
EL SEGUNDO, CA 90245

IN REPLY REFER TO
4521

APR 25 1984

/TB/FH/daj
762.440/4A441203

SUBJECT: Report on Adequacy and Compliance Review of Disclosure Statement Revision
Effective 31 October 1983
Electro-Optical and Data Systems Group
Engineering Divisions
Hughes Aircraft Company
El Segundo, California
Audit Report No. 4521-4A441203

TO: Air Force Plant Representative Office, AFCMD (AFSC)
Attention: Mr. Allan E. Brunmier, Principal Administrative Contracting Officer (PACO)
Hughes Aircraft Company
El Segundo, CA 90245

1. Purpose and Scope.

a. The purpose of our review was to determine whether the subject revised Disclosure Statement effective 31 October 1983 adequately describes the cost

accounting practices which the contractor proposes to use in the performance of its Governments contracts. Concurrently, we reviewed the revised practices to determine whether they comply with applicable Cost Accounting Standards and DAR Section XV.

b. The review was performed in accordance with generally accepted auditing standards and included such tests of the contractor's data and records and such other auditing procedures we considered necessary in the circumstances. The requirements contained in Cost Accounting Standards Board Regulations, Part 351, as implemented by DAR 3-809(c)(5)(i) and (ii) and 3-1205(d)(1), were used as criteria in ascertaining the adequacy and compliance of the subject contractor's revisions.

2. Summary Evaluation.

a. The subject Disclosure Statement revision reflects the reclassification from indirect to direct of the following managerial employees:

Job Code	Title/Description
21823	Manager Technical Department
11002	Assistant Manager Technical Department
12428	Associate Manager Technical Department
11008	Assistant Manager Technical Laboratory
12457	Associate Manager Technical Laboratory

(Exhibit F of Brunmier's Declaration)

The labor costs of these employees will be distributed to cost objectives based on the labor hours charged to cost objectives by their subordinates.

This timekeeping practice implemented by EDSG as of 31 October 1983 has been in use by the major HAC Groups for some time. The purpose is to provide proper costing of direct supervision to the benefiting activities.

b. Adequacy. In our option, the subject revision adequately describes the contractor's cost accounting practices.

c. Compliance. Our review disclosed no instances of noncompliance with CAS or DAR Section XV in the cost accounting practices reflected in the revised Disclosure Statement.

d. Cost Impact. The contractor's cost impact statement indicated a net decrease of costs allocable to Government CAS covered contracts of $49,000. Based on our review of the impact statement and supporting data, we take no exception to the methodology and the base data used by the contractor in calculating the cost impact on CAS covered Government contracts.

e. Recommendation. The contractor advised that the EDSG's timekeeping instructions provide, or will provide, that managers whose labor costs are distributed to cost objectives on the basis of labor hours charged to cost objectives by their subordinates shall request to be removed from the time distribution system whenever their labor effort is primarily dedicated to a specific contract or a CITE project (e.g. IR&D project leader) for an extended period of time. Upon the termination of such

projects the employee shall request re-instatement in the time distribution system.

We recommend that EDSG be requested to furnish AFPRO/DCAA copies of the applicable written timekeeping practices.

f. This review was limited to ascertaining the adequacy and compliance of the subject revised Disclosure Statement. Accordingly, we express no opinion as to whether the revised disclosed practices are proper, approved or agreed to for pricing proposals, accumulating cost or reporting contract performance data.

3. Concluding Remark. Additional audit assistance will be furnished as required.

DEFENSE CONTRACT
AUDIT AGENCY

/s/ Timothy P. Baum
for DUDLEY P. SLATER, Resident
Auditor

Copy furnished
AFPRO CAS Monitor (L. Sabala)
DCAA – RST – CAS Monitor
– RAM B
– CAC Network

(Exhibit G of Brunmier's Declaration)

Exhibit G

DEPARTMENT OF THE AIR FORCE

DET 36, AF CONTRACT MGT DIV. AF PLANT REPRESENTATIVE OFC (AFSC)
HUGHES AIRCRAFT COMPANY, P.O. BOX 92463

[SEAL] LOS ANGELES, CA 90009

REPLY TO ATTN OF
TMO/Sabala/414-6454 1 May 1984

SUBJECT
Disclosure Statement Amendments – Voluntary Changes

RECEIVED

TO
Hughes Aircraft Company MAY 3 1984
Attn: Mr. J Stanley Crum
Vice President and Controller
El Segundo, CA 90245 GOVERNMENT ACCOUNTING

Pursuant to FAR Part 30, I have reviewed the following disclosure statement amendments:

	Date Submitted	Effective Date
Electro-Optical and Data Systems Group-Group Office	12 Nov 82	3 Jan 83
Electro-Optical and Data Systems Group-Engineering Div	12 Nov 82	3 Jan 83
Electro-Optical and Data Systems Group-Manufacturing Div	16 Nov 82	3 Jan 83

(Exhibit G of Brunmier's Declaration)

These disclosure statement amendments contained many disclosed changes, of which, the major change was the establishment of a group-wide material overhead pool. Based on the facts contained in the above amendments, I have determined that these disclosure statement amendments are adequate and in compliance with Cost Accounting Standards. This determination does not prevent its revocation, withdrawal or reconsideration if subsequent facts indicate that some aspects of the above amendments are not in compliance. It is my opinion the disclosed accounting changes do not result in any net increased cost to Government CAS covered contracts; therefore, no contract adjustments are required.

/s/ Allan E Brunmier
ALLAN E BRUNMIER
Principal Administrative
Contracting Officer

Cy to: DCAA/El Segundo
HAC/Mr P L Hendricks, Jr.
HAC/Mr T L Dougherty
HAC/Mr A N Kennedy
HAC/Mr D M Gledhill

(Exhibit H of Brunmier's Declaration)

Exhibit H

DEPARTMENT OF THE AIR FORCE

DET 36, AF CONTRACT MGT DIV. AF PLANT
REPRESENTATIVE OFC (AFSC)
HUGHES AIRCRAFT COMPANY, P.O. BOX 92463
LOS ANGELES, CA 90009

[SEAL]

REPLY TO ATTN OF
TMO/Sabala/(213)414-6454

RECEIVED
MAY 15, 1994
GOVERNMENT
ACCOUNTING

10 May 1984

SUBJECT
Disclosure Statement Amendment-Electro-Optical & Data Systems Group Engineering Divisions

TO
Hughes Aircraft Company
Attn: Mr. J. Stanley Crum
Vice President and Controller
El Segundo, CA 90245

Pursuant to FAR Part 30, I have reviewed the Disclosure Statement for the Electro-Optical & Data Systems Group Engineering Divisions as amended 31 October 1983. This amendment reflects the reclassification of assistant and associate laboratory and department managers from indirect to direct employees. Based on the facts contained in

the above amendment, I have determined that this disclosure statement is adequate and in compliance with Cost Accounting Standards. This determination does not prevent its revocation, withdrawal or reconsideration if subsequent facts indicate that some aspects of the amendment are not in compliance. In my opinion the disclosed changes in the above amendment will have no significant cost impact on Government CAS covered contracts; therefor I am not requesting a detailed total cost impact statement. No further action regarding the disclosed changes is required.

/s/ Allan E Brunmier
ALLAN E. BRUNMIER
Principal Administrative
Contracting Officer

Cy to: DCAA/El Segundo
HAC/Mr. P.L. Hendricks, Jr.
HAC/Mr. T.L. Dougherty

APPENDIX 8

JAMES J. GALLAGHER
FRED D. HEATHER
SUSAN B. MYERS
DANA F. GARDNER
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444 South Flower Street, 8th Floor
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(213) 688-1000

Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF ROBERT MEYERS SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED CONCURRENTLY HEREWITH HUGHES AIRCRAFT COMPANY, DATE: January 24, 1993 TIME: 9:30 a.m. CTRM: Hon. Judge David V. Kenyon

I, Robert Meyers, declare as follows:

1. I am an employee of Hughes Aircraft Company ("Hughes"), and am currently employed at Hughes' corporate offices. I have personal knowledge of the facts set forth in this Declaration and if necessary could testify competently thereto under oath.

2. I was assigned to Hughes' Electro-Optical and Data Systems Group ("EDSG") in 1979 and, from 1979 to 1986, I was the Division Controller for two different divisions within EDSG. In this capacity, I was responsible for managing the finance departments of these divisions.

3. In 1986, I was promoted to Assistant Group Controller of EDSG and, in 1989, to EDSG Group Controller.

4. Throughout the late 1970's, most of the EDSG lab managers who were responsible for supervising employees who worked on a variety of contracts (*i.e.*, those who ultimately ended up on the "direct allocation pool" system), were classified "indirect" and charged their time to indirect accounts. The primary tasks performed by these supervisors included troubleshooting, insuring adequate staffing for supervised contracts, and assisting subordinates to resolve technical problems. These supervisors also performed some ancillary administrative and personnel duties.

5. The time charged by these "indirect superiors" to indirect accounts was allocated across all the contracts on which EDSG employees worked. As a result, this time was allocated to a much broader group of contracts than was supported by their efforts.

6. It was felt that there was a better causal beneficial relationship for distribution of the labor time of supervisors. Thus, in the late 1970s, EDSG management (of which I was a part) began searching for a way to distribute the labor hours of lab managers more equitably over the actual contracts benefited, such that such labor hours were spread across all of the supervised contracts.

7. In connection with this search, EDSG management considered requiring managers to charge their time directly to the particular contracts they supported through their supervisory efforts each given day, according to the number of hours spent working directly on those contracts. During this timeframe, however, these managers were supervising the labor efforts of several and potentially hundreds of employees, who were working on potentially several hundred contracts or charge numbers. A system of direct charging, therefore, would have required managers to assess on a daily basis which of several hundred account numbers was associated with each direct task, as well as whether their tasks were "direct" or indirect". Such system would have required a significant daily data-gathering exercise and manual allocation of time to the appropriate charge numbers. This method could also require a supervisor to fill out tens of timecards weekly. Management believed this system would be administratively unfeasible and costly. In addition, the accuracy of the timecharge allocations by the individual supervisors would be difficult to audit, would put an undue burden on a supervisor to maintain the manual system and would lack controls to prevent manipulation.

8. Because of the problems inherent in this proposed system, EDSG management turned to a concept of "direct labor pools" set up earlier at other Hughes' organizations. Pursuant to this direct pool system, the time of supervisory employees whose labor benefited a definable group of contracts designated by the employees supervised by such supervisors was charged to a single account number and then "allocated" across the contracts on which their subordinates worked. In that way, the labor hours of these supervisory employees was allocated only to those contracts benefited by the managers' administrative/supervisory efforts, rather than to all contracts on which EDSG worked.

9. Following an analysis of the direct allocation pool systems already implemented elsewhere within Hughes, EDSG devised a system of direct allocation pools based on a fusion of these systems. Like the systems in place elsewhere within Hughes, the direct allocation system proposed for use at EDSG was designed to fairly apportion the labor time of lab managers and their secretaries across the totality of the contracts to which employees supervised by the lab managers charged their time. After this system was disclosed to and approved by the government, it was employed throughout EDSG, including in the Systems Engineering Lab.

10. No employee within any EDSG division could charge his or her time to the allocation system unless he or she had been formally authorized by the division controller to do so, because the timecharges of any non-authorized employee who attempted to charge his time to the allocation system would have been rejected by Hughes' computerized timekeeping system. Moreover, no

employee who was on the allocation system could charge to any account number other than that used for the allocation system pool, except to charge holiday, vacation or sick-leave time.

11. Each EDSG division controller was responsible for authorizing employees within their division for inclusion in the allocation system and the supervised employees over which the supervisor's time would be allocated. This determination was made based upon a review of each employee's job classification, function and assignments. Pursuant to EDSG practices, authorized lab managers and their secretaries were eligible to be on the EDSG allocation system.

12. The allocation system was implemented as follows:

- Employees were required to submit a timecard each week, which identified each of the contracts on which they worked by account number and by the time spent working on each contract.
- Hughes' centralized timekeeping organization was responsible for entering the timecharge and account number data from all the employees' timecards into a centralized computer.
- The total hours worked by each employee authorized to charge his or her time through the allocation system also were input into the centralized computer via weekly timecards submitted by those employees. These hours then were allocated by the computer over the contracts to which the supervised employees had charged their time, in proportion to the

amount of time charged to each contract by the supervised employees.

Thus, for example: If Supervised Employee A charged 40 hours in a week to Contract X, Supervised Employee B charged 40 hours in the same week to Contract Y, and Supervised Employee C charged 40 hours for that week to Contract Z, and their supervisor charged 40 hours in the same week to the allocation system, then the computer system would automatically spread the supervisor's time in equal proportions (*i.e.*, 13.33 hours each) to each of Contracts X, Y and Z.

Because the supervisors on the allocation system supervised not merely three, but as many as several hundred employees, the labor hours of the supervisors were spread across the potentially hundreds of contracts to which their subordinates charged their time, in the appropriate percentages.

13. The determination of the appropriate percentage by which the allocation system employees' time would be spread to the contracts was not made by an individual, but was made automatically by the computer program utilized by Hughes' central timekeeping organization, and was based upon the actual hours and contracts charged by the supervised employees.

14. On a regular basis, Hughes' central timekeeping organization generated computer print-outs (known as "name runs") which they distributed to the program managers in charge of the performance of individual contracts. These name runs indicated the amounts of time each employee had charged time the contracts during a given period. The name runs also identified which

employees were on the allocation system, and how much of thei time was being allocated to the contract through the allocation system. The program managers generally disclosed the name runs on a periodic basis to the customers, including the government. This provided the customers with knowledge as to which employees were charging to the contract both directly, as well as through the allocation system.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 17 day of December, 1993, at Los Angeles, California.

/s/ Robert Meyers
ROBERT MEYERS

APPENDIX 9
(i)

JAMES J. GALLAGHER
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SUSAN B. MYERS
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Attorneys for Defendant,
HUGHES AIRCRAFT COMPANY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA *ex rel.* DON H. HAYCOCK, Plaintiff, vs. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 90-1977 KN (Tx) DECLARATION OF DUDLEY P. SLATER SUBMITTED IN SUPPORT OF HUGHES AIRCRAFT COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED CONCURRENTLY HEREWITH DATE: January 24, 1993 TIME: 9:30 a.m. CTRM: Hon. David V. Kenyon

I, Dudley P. Slater, declare as follows:

1. I am a retired government employee, having served from 1966 to 1988 with the Defense Contract Audit Agency ("DCAA"), the government agency with primary responsibility for conducting audits of bid proposals and requests for payments submitted by government defense contractors. I have personal knowledge of the following, and if necessary could testify competently thereto.

2. From August 1983 until 1988, I was assigned to the DCAA office at Hughes Aircraft Company, El Segundo ("Hughes") as the Resident Auditor, with cognizance over all audit functions. From 1983 to 1985, I had responsibility over the following Hughes' business organizations/segments: Electro-Optical and Data Systems Group ("EDSG"), Radar Systems Group ("RSG"), unclassified Space & Communications Group, and Corporate. Concurrently with my job functions as Resident Auditor, I was the Contract Audit Coordinator, with responsibility for all audit functions involving more than one segment of Hughes. In about the spring of 1985, the DCAA/El Segundo office was reorganized and another auditor took over the responsibility for EDSG and for the Unclassified Space & Communications Group. From that juncture until my retirement in 1988, I retained cognizance over Hughes RSG and Corporate.

3. Pursuant to the Cost Accounting Standards ("CAS"), prior to the first time a contractor submits a bid to work on a government contract, the contractor must submit to the DCAA and the Air Force Plant Representative Office ("AFPRO") a Cost Accounting Standards Disclosure Statement ("Disclosure Statement"), which details

the accounting practices utilized by the contractor. Disclosure to the government of the contractor's accounting practices made in the CAS Disclosure Statement is made at the level of the "business unit" that contracts to perform the effort requested by the government; a more specific disclosure with respect to each and every sub-organization under that "business unit" is not required, so long as the accounting practices of such sub-organizations are adequately described in the CAS Disclosure Statements.

4. After initial submission of a Disclosure Statement each time the contractor changes an accounting practice, it is required to submit to the DCAA and AFPRO an amended Disclosure Statement at least 60 days before the effective date of the proposed change. Thereafter, DCAA and AFPRO study the change, and either approve or reject it. Once the amended CAS Disclosure Statement is timely submitted to the government, the proposed change may be effected even before the contractor receives official approval for the change.

5. Among my responsibilities as DCAA Resident Auditor was to audit and review CAS Disclosure Statements submitted by the Hughes organizations over which I had cognizance, including EDSG. In reviewing those CAS Disclosure Statements, my office analyzed whether the practices described in the Disclosure Statements adequately described Hughes' actual accounting practices, and whether they were compliant with the Cost Accounting Standards. In conducting this review, my office evaluated the actual accounting practices in use by the business units within EDSG to determine whether such

accounting practices were adequately disclosed in Hughes' CAS Disclosure Statements.

6. In connection with my review of the Hughes' EDSG's CAS Disclosure Statements, I recall several discussions with the then-Assistant Group Controller of the EDSG, Al Kennedy, about the implementation of direct allocation pools throughout EDSG. During these discussions with Mr. Kennedy and other Hughes' personnel about this allocation system, the applicability of such a system to several "labs" organized within EDSG, whose employees worked on numerous contracts, at any given time, was discussed specifically. The allocation system at issue during these discussions involved the charging of time of lab managers and their secretaries into a direct pool, and then allocating this time over the cost objectives/contracts to which the lab employees being supervised by those lab managers charged their direct labor time.

7. In connection with my own analysis of the EDSG allocation system, I knew generally the functions of the EDSG lab managers and secretaries who were proposed to be placed on the allocation system. Based upon my knowledge of how the organizations within EDSG functioned, I understood that, while the bulk of the labor efforts of the lab managers and their support personnel specifically benefited identifiable contracts, (*i.e.*, direct labor functions), a small portion of the labor efforts of those individuals was devoted to generic administrative and supervisory tasks not specifically related to any contract. In my discussions with Hughes' personnel about the EDSG allocation system, I also was aware of the fact that because there is a grey area in distinguishing among

functions that are clearly identifiable as "direct" labor, and those clearly identifiable as "indirect" (based on the fact that the FAR definitions of direct costs – which include labor costs – and indirect costs – which include labor costs – are so broad), the lab managers and their staffs and secretaries, prior to the implementation of the allocation system, were having to make individual judgment calls as to whether each particular function they performed should be charged as a direct cost to a specific contract (or contracts), or as an indirect cost to an indirect account (which would then spread that employee's time over *all* the contracts being performed at that time by Hughes).

Because individual judgments were being made by different individuals, the distribution of those employees' timecharges was not necessarily consistent.

8. As I understood it, the rationale behind the implementation of the allocation system for EDSG was to eliminate the problems inherent in the system of relying on the individual lab managers and their support staffs to make their own judgment calls about how their time should be charged and, instead, to have *all* of the labor time of those employees charged to an allocation pool. In that manner, all of the timecharges of the manager/secretaries on the allocation system would be consistently spread to the cost objectives/contracts that were in the base of charges made by the employees being supervised by that lab manager, which is precisely what is required by the Cost Accounting Standards.

9. In connection with the discussions with Hughes about the EDSG allocation system, I reviewed specific

written finance practices prepared by Hughes which detailed the implementation of that system, which was a group-wide system that did not differentiate between the various sub-organizations and "labs" which utilized that system.

10. Also in connection with my review of EDSG's allocation system, my office analyzed the impact of having various levels of lab managers, assistant lab managers and their secretaries across EDSG charge their time into a pool which then spread the time charges of those employees to direct accounts based on the timecharges made to such accounts by the employees who were supervised by the lab managers and who were working on specific contract assignments associated with those account numbers.

11. After analyzing the allocation system that was disclosed in Hughes' EDSG CAS Disclosure Statements, my office determined that the allocation system increased the consistency and accuracy of timecharging of the lab managers and their staffs and, based upon that determination, our office (as well as the AFPRO) concluded that the allocation system by disclosed in EDSG's, CAS Disclosure Statements complied with the Cost Accounting Standards.

12. Based on these findings, I made a formal recommendation to Allen Brunmier, the Principal Administrative Contracting Officer, that the direct allocation pool system be approved.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed this 16 of December, 1993, at Los Angeles, California.

/s/ Dudley P. Slater
DUDLEY P. SLATER